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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 255

LOUIS E. RODDEWIG, AS CHAIRMAN OF THE IOWA STATE BOARD OF ASSESSMENT AND REVIEW, ETC., ET AL., PETITIONERS,

vs.

SEARS, ROEBUCK AND CO.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

PETITION FOR CERTIORARI FILED JULY 18, 1940.

CERTIORARI GRANTED OCTOBER 14, 1940.



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N SUPREME COURT OF IOWA, JANUARY TERM, 1940

9-44997. Equity

SEARS, ROEBUCK AND CO., Appellee,

vs.

LOUIS E. RODDEWIG, as Chairman of the Iowa State Board of Assessment and Review, and Individually; D. L. Murrow and C. Frank Green, as Members of the Iowa State Board of Assessment and Review, and Individually, Appellants

Appeal from District Court of Polk County, Iowa, Honorable John J. Halloran, Judge

Appellants' Abstract of the Record—Filed July 21, 1939

fol. 2] On the 24th day of September, 1938, the plaintiff, Sears, Roebuck and Company filed in the District Court in and for Polk County, Iowa, the following petition in equity:

PETITION

Comes now the plaintiff, Sears, Roebuck and Co., and for cause of action against the defendants states and shows to the Court as follows:

1. That plaintiff is a corporation organized under the laws of the State of New York, with its principal operating office in the City of Chicago, Illinois. Plaintiff is engaged in the business of retail merchandising.

2. That defendant, Louis E. Roddewig, is the duly appointed, qualified and acting Chairman of the Iowa State Board of Assessment and Review; that defendant, D. L. Murrow, is the duly appointed, qualified and acting Vice Chairman of said Board, and defendant, C. Frank Green, is a member thereof. All defendants have their official residence in the City of Des Moines, Iowa. The defendants, as members of the Iowa State Board of Assessment and Review, are by statute vested with jurisdiction and authority to administer the tax laws of the State of Iowa, and are

particularly given jurisdiction and authority to enforce the provisions of Chapter 198 of the Acts of the Forty-seventh General Assembly of the State of Iowa, commonly known as the "Use Tax Act."

3. That under the provisions of the laws of the State of Iowa, as evidenced by Chapter 386, Code of Iowa 1927 (same, Code of Iowa, 1935), a copy of which is hereto annexed, marked Exhibit "D" and by this reference hereby made a part hereof, any corporation for pecuniary profit organized under the laws of another state which desires to transact business in the State of Iowa is required to file with the Secretary of State a certified copy of its articles [fol. 3] of incorporation, accompanied by a resolution of its Board of Directors or stockholders authorizing the filing thereof, and also authorizing service of process to be made upon any of its officers or agents in the State of Iowa engaged in transacting its business, and requesting the issuance to such corporation of a permit to transact business in Iowa. Such application is required to contain a statement of the value of all money or other property the corporation has in use or held as an investment in the State of Iowa at the time the statement is made, and which it proposes or expects to make use of in the State of Iowa during the ensuing year. Such laws also require the payment of a fee of twenty-five dollars upon ten thousand dollars or less of money or property of such company actually within the State, and one dollar for each one thousand dollars of such money or property within the State in excess of ten thousand dollars, and upon compliance therewith the Secretary of State is required to issue to such corporation a permit for the transaction of business of such corporation within the State, upon the receipt of which it shall be permitted and authorized to so conduct and carry on its business. Such laws also require, at least annually, a statement of increase in capital, and a payment of additional fees for any such increase in capital. For a violation of the provisions of said Chapter 386 there is provided a penalty of one hundred dollars for each and every day in which such business is transacted or carried on.

Pursuant to the provisions of said laws, plaintiff, on or about June 26, 1928, made application for such permit in complete compliance with said laws, and paid to the Secretary of State of Iowa the sum of $50.00, whereupon the

Secretary of State issued to it a permit authorizing it to conduct and carry on its business as a foreign corporation in the State of Iowa. Said permit has never been revoked, [fol. 4] and since the issuance thereof has at all times been and now is in full force and effect. Subsequently said plaintiff made reports to the Secretary of State of the increase in the amount of its capital, and on account thereof on September 20, 1929, paid to the Secretary of State the sum of $142.00, on July 29, 1930, the sum of $59.00, on August 28, 1934, the sum of $44.00, on August 23, 1935, the sum of $129.00, on August 20, 1936, the sum of $39.00, and on August 2, 1937, the sum of $75.00.

Subsequently to and shortly after the issuance to it of said permit to conduct and transact its business as a foreign corporation in the State of Iowa, plaintiff commenced to conduct a retail merchandising business in said State by opening and operating at various locations from time to time retail department stores wherein it sells and offers for sale extensive lines of goods, wares, and merchandise. Plaintiff now owns, maintains, and operates within the State of Iowa twelve retail department stores, at which it sells at retail varied lines of goods, wares and merchandise.

Plaintiff has entered into long-time leases covering the locations in which it conducts said retail business, all of which extend for a substantial period of years. The majority of the leases at the larger stores within the State of Iowa are for periods of ten to twenty years, and all of said leases have a number of years yet to run. Said leases are not subject to cancellation, and plaintiff is obligated to continue payments of rentals thereunder. In addition to the investment in and liability upon the leases upon its store locations within the State of Iowa, plaintiff has expended large sums of money in equipping said stores with furniture, fixtures and appliances necessary for the conduct of retail department stores, and has stocked said stores with extensive lines of merchandise. That plaintiff's investment in furniture, [fol. 5] fixtures, equipment and stocks in the State of Iowa exceeds the sum of $500,000.00, and its liability upon the unexpired terms of leases entered into amounts to many thousands of dollars.

When it entered the State of Iowa and commenced to transact business therein, and since, and when it expended money in equipping and stocking its stores within said

state, and when it obligated itself under said long-term leases, plaintiff relied upon the rights and privileges given and inuring to it by and under said permit or contract, in the light of the statutes and Constitutions of the State of Iowa and of the United States.

4. That on March 31, 1937, Chapter 196 of the Laws of the Forty-seventh General Assembly of the State of Iowa became effective by publication. That in and by Section 11 thereof, a true copy of which is hereto attached, marked Exhibit "E", and by this reference hereby made a part hereof, it is provided that it shall be unlawful for any person to engage in or transact business as a retailer within the State unless a permit or permits shall have been issued to him as therein prescribed. And in and by subparagraph 2 of Section 16 of said Chapter 196, a true copy of which is hereto attached, marked Exhibit "F", and by this reference hereby made a part hereof, it is provided that any person who shall sell tangible personal property at retail without procuring a license, as provided in said Section 11, or whose license shall have been revoked, shall be guilty of a misdemeanor, punishable by a fine of not more than one thousand dollars or imprisonment for not more than one year, or both such fine and imprisonment in the discretion of the court.

That plaintiff now conducts its said retail merchandising business in the State of Iowa in twelve separate stores, and did apply for and procure from the Iowa State [fol. 6] Board of Assessment and Review permits pursuant to the provisions of said Section 11 of said Chapter 196 of the Laws of the Forty-seventh General Assembly, for each of its said stores, which permits are in full force and effect. That the aggregate annual sales at retail in its said twelve stores located within the State of Iowa exceed the sum of $2,500,000.00. That plaintiff has collected the retail sales tax as prescribed by said Chapter 196 of the Laws of the Forty-seventh General Assembly on account of said sales and paid the same in accordance with said Act to the State of Iowa.

That in each of its said retail merchandising stores so located in the State of Iowa, plaintiff has, since April 16, 1937, from time to time accepted orders for merchandise and tangible personal property, which said orders were filled by shipments of such merchandise or tangible per-

sonal property from points without the State of Iowa to the purchaser in Iowa, and upon all of such orders and shipments plaintiff has reported and paid to the Iowa State Board of Assessment and Review the amount of the use tax so provided in and by the terms of the Use Tax Statute of the State of Iowa, a copy of which is hereto annexed, marked Exhibit "A". And plaintiff has also reported and paid to the State Board of Assessment and Review, the amount of the use tax provided by said Use Tax Act representing two per cent of the purchase price of all tangible personal property purchased without the State of Iowa and transported to its said stores in the State of Iowa for its own use and not for resale. That the amount of such payments of said use tax, representing such transactions to and including March 31, 1938, aggregated the sum of $7,853.02.

5. That for many years past, and continuously to the present time, and long prior to its entry into the State of [fol. 7] Iowa, plaintiff was extensively engaged in the business of selling goods, wares and merchandise at retail through the medium commonly known as the "mail order" business, to customers in the State of Iowa as well as in substantially all the other parts of the United States. Plaintiff has, and does now maintain in the City of Chicago, Illinois and other cities of the United States mail order stores or establishments from which it customarily distributes by United States mail and other public carriers to prospective customers located in the State of Iowa and elsewhere, catalogs and price lists describing by illustration and otherwise the character, quality and price of the goods offered for sale by plaintiff. That prospective customers desiring to purchase goods or merchandise make out and transmit their orders therefor to said mail order stores outside the State of Iowa, accompanied by the cash purchase price of the articles which they desire to purchase. The customers usually specify the transportation means which they desire used to effect delivery to them, and the customers pay the transportation cost of such merchandise from the City of Chicago or from such other points without the State of Iowa from which the goods are shipped to the purchasers. And the fact that such goods will be shipped to such purchasers who are resident in the State of Iowa in interstate commerce is known to such purchasers when their orders

are sent to the said mail order houses. All such orders are either accepted or rejected at the mail order stores to which they are sent, with few exceptions. That in addition to its main store and office located in the City of Chicago, Illinois, plaintiff owns and operates certain other branches and distributing warehouses at points outside the State of Iowa from which particular kinds of merchandise ordered by its customers is customarily shipped to points within the State of Iowa. When orders transmitted to plaintiff [fol. 8] by its customers are accepted, plaintiff ships the merchandise so ordered to its customers within the State of Iowa by whatever transportation means were specified by the customer.

6. That plaintiff has in the State of Iowa large numbers of customers who regularly purchase from it the goods, wares and merchandise offered through its catalogs and price lists. Plaintiff through a long period of years has built up a large volume of such mail order business with persons residing within the State of Iowa and elsewhere, and through its conduct and fair dealing with such customers has acquired an established reputation and standing in the mail order business, and has acquired the substantial good will of its customers, and that the sales to its customers located within the State of Iowa constitute a substantial portion of the business done by plaintiff through the "mail order" method.

7. That the mail order business so conducted by plaintiff constitutes sales in interstate commerce, and that the State of Iowa has no jurisdiction to impose taxes upon such sales or to otherwise burden or regulate such transactions by the imposition of tax laws or otherwise, and that plaintiff cannot be required under the laws and Constitution of the United States to secure from the State of Iowa, or its administrative officers or bodies, any license to engage in such business.

8. Plaintiff attaches hereto a true and correct copy of the so-called "Use Tax Act" of the Forty-seventh General Assembly of the State of Iowa, which became effective by publication on April 15, 1937. Said copy is identified as Exhibit "A" hereto, and is by this reference made a part hereof as fully as though set forth herein at length. That by the terms of said Act an excise tax is imposed on

the use in the State of Iowa of tangible personal property [fol. 9] purchased on or after the effective date of the Act, at the rate of two per cent of the purchase price of said property. That articles purchased outside the State of Iowa for use within the State, but subjected to a retail sales tax at the place of such purchase, are exempted from the tax if the tax imposed thereon was equal to or greater than that imposed by the Iowa Retail Sales Tax Act. By Section 4 of the so-called "Use Tax Act" it is provided that "evidence that tangible personal property was sold by any person for delivery in this state, shall be prima facie evidence that such tangible personal property was sold for use in this state." By the provisions of Section 8 of said Use Tax Act, every retailer maintaining a place of business within the State and making sale of tangible personal property for use within the State where such sales are not exempted under the provisions of Section 3 thereof, nor collectible under the provisions of Section 6 thereof, is required at the time of making such sales "whether within or without the State", to collect the tax imposed by the Act from the purchaser and give to the purchaser a receipt therefor in the manner and form prescribed by the Iowa State Board of Assessment and Review. By the provisions of Section 3 of said Use Tax Act, the use of tangible personal property, the gross receipts from the sale of which are required to be included in the measure of the tax imposed by Senate File 316, Acts of the Forty-seventh General Assembly (Sales Tax Act, Chap. 196, 47th G. A.), are specifically exempted. Plaintiff has collected and paid, and now collects and pays, the Iowa Retail Sales Tax prescribed by said Senate File 316, Acts of the Forty-seventh General Assembly of the State of Iowa, upon all sales at retail consummated and completed in its stores within the State of Iowa, and plaintiff has paid to the Iowa State Board of Assessment and Review, the amount of the use tax so [fol. 10] provided in said Use Tax Act on all sales of tangible personal property made in any of its stores located in the State of Iowa when such tangible personal property thus sold was shipped from points without the State of Iowa to the purchaser in Iowa. But plaintiff has never collected nor paid the so-called use tax upon its mail order sales made from its Chicago, Illinois, store or other stores or branch warehouses or factories located outside the State of Iowa, for shipment to persons located within the State

of Iowa pursuant to orders so sent by such persons to such stores or warehouses or factories, outside the State of Iowa. The retail stores of plaintiff in the State of Iowa do not issue any catalogs and do not fill any orders directed to the mail order department of plaintiff.

9. That there are numerous persons, firms and corporations who maintain no place of business within the State of Iowa for the conduct of retail merchandising of tangible personal property, and who maintain and operate so-called mail order stores in the City of Chicago, Illinois, and elsewhere in the United States, from which tangible personal property is sold and distributed to customers by the so-called mail order method, that is, through sales made wholly in interstate commerce, although the tangible personal property thus sold to residents of the State of Iowa is or may be for use within said State. That said other mail order businesses are in direct competition with this plaintiff, particularly in the State of Iowa; and on information and belief, plaintiff alleges that the volume of such mail order transactions between such competitors and residents of the State of Iowa has heretofore been and is now substantial, and will continue to be substantial: but plaintiff alleges that said competitors are not and cannot be required to collect from such mail order customers the use tax imposed by the Use Tax Act of the State of Iowa, nor to remit [fol. 11] the same to the State of Iowa, or otherwise comply with such Use Tax Act in respect of tangible personal property sold by them and delivered to purchasers within the State of Iowa, and notwithstanding that such tangible personal property is used within said State.

That such tangible personal property thus sold by such competitors of this plaintiff to residents of the State of Iowa is substantial and is of the same general type and character as the tangible personal property sold by plaintiff to residents of the State of Iowa through its "mail order" business,—that is, in interstate commerce. That such mail order business in respect of most of the articles dealt in is highly competitive, and the merchants engaged therein largely depend upon their ability to sell at a favorable price to the purchaser; so that the success or failure of such business depends to a great extent upon the ability of the merchant to meet the prices maintaining in the general mail order market. If plaintiff is compelled to add to

its prices of the tangible personal property that it sells in the mail order business, in interstate commerce, the amount of the use tax imposed by the Use Tax Act of the State of Iowa, it will be subjected to undue and disastrous competitive results by reason of the fact that its aforesaid competitors, being under no obligation to collect the use tax, will be able to offer a more favorable price: and thus the plaintiff will be subjected to an unlawful discrimination and denied the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States.

10. That defendants, acting in their capacity as members of the Iowa State Board of Assessment and Review and purporting to act under the authority vested in them by the said Iowa Use Tax Act, have construed said statute as authorizing and empowering them to require plaintiff [fol. 12] at the time of making sales of tangible personal property for delivery in the State of Iowa, even though such sales are made and consummated outside the State of Iowa, and even though plaintiff has no actual knowledge that such property is to be used within the State of Iowa, to charge and collect from its mail order customers located within the State of Iowa the so-called Iowa use tax amounting to two per cent of the purchase price of said articles. That the said statute as so construed and applied by the defendants and by the administrative officers of the State of Iowa is unconstitutional and void, in that it results in the imposition of a tax upon sales in interstate commerce at the time of the making of such sales and long before the tangible personal property, the subject of such sales, has been delivered in the State of Iowa, and long before such property has been subjected to use by residents of the State of Iowa, contrary to the provisions of Section 8 of Article I of the Constitution of the United States, which provides that the Congress of the United States shall have exclusive power to regulate commerce with foreign nations and among the several states. And that said statute as so construed and applied by said defendants and the administrative officers of the State of Iowa, is further unconstitutional and void in that it constitutes a regulation of the mode in which the plaintiff is required to conduct its business without the boundaries of the State of Iowa, and constitutes the making of the plaintiff an assessor and a

collector of taxes outside the boundaries of the State of Iowa, all contrary to and in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

11. That on or about the 20th day of March, 1938, at a session of the Iowa State Board of Assessment and Review, defendants, purporting to act in their capacities as members [fol. 13] of said Board, adopted a resolution, a true copy of which is hereto attached marked Exhibit "B", and by this reference is made a part hereof. On the 30th day of March, 1938, the defendants, purporting to act in their capacities as members of said Board, caused to be served on plaintiff at Des Moines, Iowa, a notice, a true and correct copy of which is hereto attached marked Exhibit "C", and by this reference made a part hereof. That the hearing originally set before said Board for April 19, 1938, was continued and postponed until May 9, 1938.

Plaintiff on May 2, 1938, filed in the District Court of the United States for the Southern District of Iowa, Central Division, its bill of complaint, seeking an order, as well as an injunction, restraining and enjoining the defendants from taking any steps to oust plaintiff from the State of Iowa or to interfere with its right to do business within said state, and from enforcing or attempting to enforce as against the plaintiff the so-called Use Tax Act of the State of Iowa. And, such temporary restraining order was granted and issued by said United States District Court for the Southern District of Iowa on May 18, 1938, and continued in force until the 26th day of August, 1938, when said action was dismissed and said restraining order annulled on the sole ground that the court was without jurisdiction to entertain said cause because of the amendment of 1937 by Congress depriving the United States District Court of jurisdiction to issue injunction or restraining orders concerning the assessment or collection of taxes by any state.

Plaintiff alleges that if said hearing before the State Board of Assessment and Review is held, that said Board will make a finding that plaintiff has violated the provisions of the Use Tax Act by failing and refusing to collect upon its mail order sales to persons within the State of Iowa [fol. 14] the so-called "Iowa Use Tax" amounting to two per cent thereof, and because of said alleged violation de-

fendants will revoke the plaintiff's license as a retailer under the Iowa Sales Tax Act, and will certify to the Secretary of State of the State of Iowa a copy of its order finding that plaintiff has failed to comply with the order of said Board, and that by the provisions of Section 21 of the Use Tax Act, upon receipt of such certification it is made the mandatory duty of the Secretary of State of the State of Iowa to revoke plaintiff's license and qualification to do business as a foreign corporation within the State of Iowa. That if the license of plaintiff as a foreign corporation in the State of Iowa and its license as a retailer under the Iowa Retail Sales Tax Act are revoked by the defendants or by the Secretary of State of the State of Iowa, plaintiff cannot lawfully carry on its retail business within said state, and that it will be deprived of its property rights within said state, and will thereby be subjected to irreparable damage and will be deprived of its investment in retail establishments within the State of Iowa, amounting to largely in excess of Five Hundred Thousand Dollars.

That the said license or permit so granted to plaintiff to transact business within the State of Iowa as a foreign corporation under the circumstances hereinbefore alleged, and the said several permits so granted to plaintiff to conduct its retail merchandising business in each of its twelve stores located within the State of Iowa under the circumstances hereinbefore alleged, constitute property rights and valid and subsisting contracts between the State of Iowa and plaintiff; and the revocation of such permit to transact business in the State of Iowa as a foreign corporation and such permits to conduct a retail merchandise business in its said several stores in Iowa, will result in the deprivation by the State of Iowa of the property of plaintiff without [fol. 15] due process of law, contrary to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and will result in the impairment of the obligation of said contracts, contrary to the provisions of Section 10 of Article I of the Constitution of the United States, which provides that no state shall pass any law impairing the obligation of contracts.

12. Plaintiff maintains no separate record of individual sales to customers residing within the State of Iowa, nor any other records which permit the segregation of mail order sales to customers residing in the State of Iowa, or

for use in the State of Iowa, from other sales made by plaintiff through its mail order houses. The maintenance of such records in plaintiff's mail order houses would constitute a substantial expense, and plaintiff avers that such records are not customarily kept and maintained by other persons engaging in the mail order business in competition with plaintiff who sell to persons located in the State of Iowa.

13. Plaintiff avers that the said Use Tax Act of the State of Iowa as construed and applied by the defendants insofar as it requires plaintiff to charge and collect said use tax upon sales made to persons within the State of Iowa as a result of mail orders received and accepted at its places of business without the State of Iowa, and which sales were filled by shipments from without the State of Iowa to persons within the State of Iowa, contravenes the provisions of the United States Constitution in the following particulars, and as to plaintiff said statute is null and void because in conflict with the provisions of the Constitution of the United States in the following particulars, to-wit:

(1) The requirement that plaintiff collect such tax and issue to purchasers receipts showing the amount of such [fol. 16] use tax, constitutes a direct burden and restriction upon the privilege of engaging in interstate commerce, and constitutes a violation of Section 8 of Article I of the Constitution of the United States.

(2) The requirement that plaintiff collect the so-called "Use Tax" on sales made to persons within the State of Iowa constitutes a direct regulation of commerce between the several states, in direct violation of the provisions of Section 8 of Article I of the Constitution of the United States.

(3) That the provisions of Section 4 of the Iowa Use Tax Act which render the fact that tangible personal property is sold for delivery in the State of Iowa prima facie evidence that such sale is for use in the State of Iowa, are arbitrary, capricious and void, and in contravention of the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(4) That the provisions of said Use Tax Act making plaintiff primarily liable for the amount of the tax, and

requiring plaintiff to collect and remit such tax, as construed by the defendants, imposes a liability upon plaintiff solely because of the exercise by plaintiff of the privilege of engaging in the interstate commerce transactions hereinbefore described, and in direct violation of the provisions of Section 8, Article I of the Constitution of the United States.

(5) That the provisions of the Use Tax Act requiring plaintiff to act as a collector of a tax imposed by the State of Iowa upon interstate commerce transactions engaged in by plaintiff, directly burdens and constitutes a regulation of interstate commerce in violation of the provisions of Section 8 of Article I of the Constitution of the United States.

[fol. 17] (6) That as construed and applied by defendants, the Iowa Use Tax Act imposes upon sales made by plaintiff in interstate commerce a direct tax, and exacts of plaintiff a tax for the privilege of engaging in interstate commerce, all in violation of Section 8, Article I of the Constitution of the United States.

(7) As construed by defendants, the provisions of said Use Tax Act which authorize the defendants and the Secretary of State of the State of Iowa to revoke the plaintiff's right to do business within the State unless plaintiff submits to an unauthorized and unconstitutional tax upon its interstate commerce transactions, deprives plaintiff of its property within the State of Iowa without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(8) That insofar as the said Use Tax Act as construed and applied by the defendants undertakes to authorize the defendants and the Secretary of State of the State of Iowa to revoke plaintiff's permit to transact business in the State of Iowa as a foreign corporation, or to revoke plaintiff's several licenses to conduct its business as a retail merchant in its several stores is unconstitutional and void, because it impairs the obligation of valid and subsisting contracts contrary to the provisions of Section 10 of Article I of the Constitution of the United States.

(9) That the requirements of said Use Tax Act as construed and applied by said defendants, unreasonably discriminate against plaintiff in its right to transact business

within the State, unless plaintiff submits to an unconstitutional and unwarranted exaction of a tax upon its transactions in interstate commerce, and thereby plaintiff is de- [fol. 18] prived and denied the equal protection of the laws of the State of Iowa, in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

(10) That the requirement that plaintiff collect and remit the use tax on sales made by plaintiff at retail at points outside the State of Iowa, violates Section 10 of Article I of the Constitution of the United States, in that the Use Tax Act in substance and effect, and as construed by the defendants herein, amounts to an impost or duty on merchandise imported into the State of Iowa from points outside said state, and that the consent of the Congress of the United States to such impost or duty has never been procured.

(11) That said Use Tax Act, as construed and applied by the defendants, requires plaintiff upon its activities without the State of Iowa, to collect for the benefit of the state a tax, and that the action of the defendants constitutes an effort to apply and enforce the laws of the State of Iowa beyond the boundaries of said State, and that thereby plaintiff is deprived of property without due process of law, in violation of the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(12) The requirement that this plaintiff act as a tax collecting agent of the State of Iowa at a point outside the State of Iowa, is an attempt of the State of Iowa to enforce its laws extraterritorially.

(13) The requirement of said Use Tax Act, as construed and applied by defendants, that plaintiff must collect the use tax upon sales of merchandise in interstate commerce merely because plaintiff operates retail stores within the State of Iowa, discriminates between plaintiff and other [fol. 19] competing mail order houses making similar sales to persons within the State of Iowa, but which do not maintain retail stores or establishments within said State, and that thereby plaintiff is denied the equal protection of the law and deprived of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

(14) That the Use Tax Act, as construed and applied by the defendants in requiring plaintiff to collect the so-called "Use Tax" upon sales to persons within the State of Iowa, is arbitrary, capricious, vague and uncertain, in that the fact that the sale of goods to persons in the State of Iowa has no direct connection with the use of said merchandise in said state. Plaintiff avers that it frequently sells merchandise to be shipped to points within the State of Iowa which is to be used by the purchaser at points without the State of Iowa, and that the statute as construed and applied by the defendants requires plaintiff to determine at its peril as to where such merchandise will be used by the purchaser, and that thereby plaintiff is deprived of its property without due process of law, in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

14. Plaintiff avers that unless defendants are enjoined and restrained from proceeding with the threatened revocation of plaintiff's permit to do a retail business within the State of Iowa, and its license as a non-resident corporation within said State, irreparable injury will result to it, in that the substantial business in the State of Iowa which plaintiff has built up since the year 1929 will be wholly destroyed, and plaintiff will be substantially de-
[fol. 20] prived of its investment in leases, store fixtures, appliances and equipment, and in inventories of merchandise located within said State. In addition thereto, plaintiff will be deprived of the good will which it has acquired and which is dependent upon its continued ability to serve its customers, and to service merchandise, such as electric refrigerators, washing machines, power implements, oil burners and other merchandise requiring service and repairs from time to time. Plaintiff has no plain, speedy and adequate remedy at law, and no administrative remedy, by appeal or otherwise from the threatened order of revocation of its permits and license to do business in the State of Iowa.

15. Plaintiff avers that unless enjoined and restrained by the order of this Court, defendants acting in their capacities as administrative officers of the State of Iowa, will proceed with the hearing referred to in the notice, Exhibit "C", and will revoke the retailer's permit of plaintiff, and that by the provisions of Section 21 of said Use

Tax Act, it is made the mandatory duty of the Secretary of State to revoke plaintiff's license to do business, and that such revocation will follow, unless the defendants are restrained by the order of this Court from taking such action. That in order to preserve the rights of the plaintiff in the conduct of its business within the State of Iowa, it is necessary that a temporary injunction be issued by this Court restraining and enjoining, until the trial of this action, the defendants and their servants and employes, and all persons acting under the authority of their offices, from taking any steps or interfering with the conduct of plaintiff's retail business within the State of Iowa.

Wherefore, and to the end that plaintiff may not suffer irreparable injury and damage, and may be permitted to continue its valid, legal retail business within the State of [fol. 21] Iowa, and to preserve its vested property rights acquired under the valid laws of said state, plaintiff prays that the defendants and each of them, individually and in their capacities as chairman and members of the State Board of Assessment and Review, appear to and make answer to this petition within the time and manner required by law, and

That the said act of the General Assembly of the State of Iowa known as the "Personal Property Use Tax Act" and being numbered Senate File 317 of the Forty-seventh General Assembly, and having been approved by the Governor of the State of Iowa on, to-wit, April 12, 1937, be adjudged and declared to be null and void and of no force and effect whatsoever upon the grounds and for the reasons set out and alleged in this petition, and upon such other grounds and for such other reasons as may to this Honorable Court seem just and equitable and reasonable, and as may by this Honorable Court be found to exist.

Plaintiff further prays that, pending a trial and hearing of this suit upon its merits, a temporary injunction issue restraining and enjoining the defendants, individually and as members of the Iowa State Board of Assessment and Review, and all persons acting by, through or under them or under the color of their offices, from doing any and each of the following acts:

(a) Making or entering any finding or order that plaintiff has failed to comply with the purported requirements of the order of said State Board of Assessment and Review dated March 30, 1938.

(b) Making any finding that plaintiff has failed to comply with the provisions of the Iowa Use Tax Law.

[fol. 22] (c) Revoking or canceling any sales permit issued to plaintiff covering the operation of its retail stores within the State of Iowa.

(d) Certifying or transmitting to the Secretary of State of the State of Iowa any order or finding with respect to plaintiff's alleged failure to comply with the laws of Iowa with respect to the collection of the so-called "Use Tax", or making any request upon the Secretary of State for the revocation of plaintiff's license to do business within said State as a non-resident corporation, and

(e) From taking any action for the enforcement of the so-called "order" of the Iowa State Board of Assessment and Review dated March 30, 1938, or disturbing the property or position of plaintiff with respect to its business in the State of Iowa as the result of any failure or refusal on the part of plaintiff to comply with the provisions of the so-called "Iowa Use Tax Act", as construed and applied by the defendants.

Plaintiff further prays that upon final hearing upon the merits, the temporary injunction herein prayed be made permanent and perpetual, and that defendants be permanently restrained and enjoined from performing each, all and any of said acts, and plaintiff further prays that it have such relief as it may show itself entitled to receive in equity, and that it have judgment against the defendants individually, and in their capacities as Chairman and members of the Iowa State Board of Assessment and review, for its costs and disbursements herein as taxed by the Clerk.

[fol. 23] *Duly sworn to by E. B. Shapiro. Jurat omitted in printing.*

Exhibits Attached to Said Petition

EXHIBIT "A"

Pamphlet copy of Senate File 317 Acts of the 47th General Assembly entitled Personal Property "Use Tax" Act.

EXHIBIT "B"

Filed March 30, 1938

State Board of Assessment and Review

Resolution and Order of the Iowa State Board of Assessment and Review

* * * * * * *

At a meeting of the Iowa State Board of Assessment and Review held this 30th day of March, 1938, the matter of Sears-Roebuck & Company came before the Board for consideration in regard to the Use Tax Law. On motion of C. F. Green, seconded by D. L. Murrow, the following Resolution and Order was adopted, all members of the Board voting aye:

[fol. 24] Whereas, Sears-Roebuck & Company is a corporation organized under the laws of the State of New York for the purpose of engaging in the retail sale of wares and miscellaneous articles of merchandise; and

Whereas, Sears-Roebuck & Company did on or about the 2nd day of March, 1928, duly make application to the Secretary of State for a permit to transact business in the State of Iowa and pursuant thereto received a permit authorizing it to conduct and carry on its business in the State of Iowa; and

Whereas, Sears-Roebuck & Company has heretofore made application for and received a permit to transact business as a retailer with the State of Iowa and by virtue of the foregoing maintains within the State of Iowa approximately 13 retail establishments or places of business and is a retailer within the purview of subdivisions 5 and 6 of Section 1 of Chapter 198 of the Laws of the 47th General Assembly; and

Whereas, Sears-Roebuck & Company issues, distributes and widely circulates in Iowa its catalog wherein it describes and pictures merchandise which is obtainable at its various retail establishments within the State of Iowa or at retail establishments maintained by other retailers in the State of Iowa and solicits the purchase of any of the items so described in its catalog through mail orders sent direct to its home office in Chicago, Illinois, thereto to be accepted, filled and shipped; and

Whereas, one or more of said catalogs are also kept at each of the said retail stores maintained by Sears-Roebuck

& Company within the State of Iowa; and whereas citizens and residents of the State of Iowa who come to any of said stores of Sears-Roebuck & Company located in the State of Iowa are assisted in selecting from the mail order catalogs there kept and displayed any of the articles of merchandise [fol. 25] listed therein and are assisted in filling out order blanks for said merchandise to be mailed to the Chicago, Illinois, branch of said company by either the purchaser or the assisting retail store; and

Whereas, it is intended, and as a matter of fact, citizens and residents of Iowa are thereby induced and encouraged to view at the retail establishments maintained by Sears-Roebuck & Company items of merchandise that they desire to purchase and then to mail or have their orders mailed for said merchandise to Sears-Roebuck & Company's Chicago, Illinois, office to be shipped direct to said purchaser by mail, freight, or express and thus avoid the 2% sales tax or use tax which said purchaser otherwise would have had to pay if he had purchased said item in Iowa, or from some other retailer maintaining a store in Iowa, or had taken said item from the stock of merchandise kept at one of the retail establishments maintained by Sears-Roebuck & Company in the State of Iowa; and

Whereas, Sears-Roebuck & Company has failed, neglected, and refused to comply with the provisions of Chapter 198 of the Acts of the 47th General Assembly in the following particulars, to-wit:

(a) By refusing and failing to comply with the mandatory provision of section 8 of the Act, which requires every retailer maintaining a place of business in the State of Iowa and making sales of tangible personal property for use in the State of Iowa to collect the tax imposed by the Act from the purchaser at the time of making the sale, whether said sale was made within or without the State of Iowa.

(b) By neglecting, failing, and refusing to file with the Board returns showing the sales of any or all tangible personal property sold by Sears-Roebuck & Company during [fol. 26] the preceding quarterly period for use within the State of Iowa, or to make any remittance of the amount of such tax which they are, by Section 12 of the Act, required to collect; and

Whereas, it is a matter of common knowledge that it is impossible from an enforcement and administrative stand-

point for the State of Iowa to collect the use tax or the sales tax from the purchaser unless the retailer, acting as the designated agent of the state collects said tax and remits the same to the State; and

Whereas, Sears-Roebuck & Company is given equal protection of its property located within the State of Iowa and is equally offered all of the facilities enjoined by any other retailer in the State of Iowa; and

Whereas, Sears-Roebuck & Company by its refusal to comply with the provisions of the Act, as above specified, seeks to and does unfairly compete with all other retail dealers in the State of Iowa who comply with the requirements of the sales tax act and the use tax act and who collect said sales and use tax as by law required; and

Whereas, Sears-Roebuck & Company is engaged in an unfair trade practice by using the branch retail establishments it maintains in the State of Iowa and the retail establishments it maintains outside of the State of Iowa as a means of circumventing the sales tax act of Iowa and as a means of offering its Iowa customers a 2% differential on all purchases made by said Iowa customers from it over like purchases said customers might make from other Iowa retailers; and

Whereas, Sears-Roebuck & Company by adopting the aforesaid practices and refusing to perform its duties with reference to the use tax is inducing citizens of this State to evade the laws of the State of Iowa to the detriment of [fol. 27] the public revenue and to the unfair advantage of law abiding competitors.

Now, Therefore, Be It Resolved by the Iowa State Board of Assessment and Review pursuant to the powers vested in it by law, and it is hereby Ordered as follows:

1. That Sears-Roebuck & Company comply with the mandatory provisions of Section 8 of Chapter 198 of the acts of the 47th General Assembly, known as the Use Tax Act, by collecting from its Iowa purchasers the tax required on all sales of tangible personal property sold by it to said purchaser for use in the State of Iowa.

2. That Sears-Roebuck & Company file with the Iowa Board of Assessment and Review within twelve days from the date of the service of this order all quarterly reports re-

quired by the provisions of the Use Tax Act, Chapter 198 of the Laws of the 47th General Assembly and not heretofore filed.

3. That Sears-Roebuck & Company pay to the Iowa Board of Assessment and Review within twelve days from the date of the service of this order all use tax due the State of Iowa as shown by said quarterly reports and as required by the provisions of Chapter 198 of the Laws of the 47th General Assembly and all penalties and interest due thereon as required by Section 17 of said Act.

4. That Sears-Roebuck & Company make available at Des Moines, Iowa, within twelve days from the date of the service of this order, all of its books, papers, and records relating to all sales of tangible personal property made by it beginning with the first day of April, 1937, to Iowa customers for use or enjoyment within the State of Iowa for such examination and audit as the Iowa State Board of Assessment and Review shall deem it advisable to make.

It is further resolved and ordered that on the 19th day of April, 1938, at 9:30 A. M. a hearing will be held by the [fol. 28] Iowa State Board of Assessment and Review at its office in Des Moines, Iowa, to determine whether or not the above and foregoing order and all portions thereof have been complied with at which time and place you, Sears-Roebuck & Company, may be present and represented by counsel, if you so desire.

It is further resolved and ordered that if at said hearing the Iowa State Board of Assessment and Review shall find that you have wilfully failed to comply with the requirements of the foregoing order, then the sales permit heretofore issued to you for the operation of your retail establishments in the State of Iowa will be cancelled and an order shall be entered finding that you have failed to comply with the specific provisions of the Use Tax Act and the orders of the Iowa State Board of Assessment and Review in connection therewith, and a copy of said order shall be transmitted to the Secretary of State with the request that your permit to do business within the State of Iowa shall be revoked.

It is further resolved and ordered that at the hearing to be held at the time and place above indicated, you may

appear and show cause, if any you have, why the orders above referred to or any of them should not be made.

Signed this 30th day of April, 1938.

Iowa State Board of Assessment and Review, (Signed) by Louis E. Roddewig, Chairman, (Signed) D. L. Murrow, Member, (Signed) C. F. Green, Member.

EXHIBIT "C"

Notice

To Sears-Roebuck & Company:

You are hereby notified that on the 30th day of March, 1938, the Iowa State Board of Assessment and Review pur- [fol. 29] suant to the powers vested in it by law of the State of Iowa did make and enter the Resolution and Order hereto attached marked Exhibit "A" and hereby made a part of this Notice.

You are further notified that in accordance with the Resolution and Order hereto attached the hearing ordered in said Resolution and Order will be held on the 19th day of April, 1938, at 9:30 A. M. at the office of the Iowa State Board of Assessment and Review at the Des Moines Building, Des Moines, Iowa, to determine whether or not you have complied with the said order.

You are further notified that if at said hearing the Iowa State Board of Assessment and Review shall find that you have willfully failed to comply with the requirements of the Resolution and Order thereto attached and marked Exhibit "A", then the sales permit heretofore issued to you for the operation of your retail establishments in the State of Iowa will be cancelled and an order shall be entered finding that you have failed to comply with the provisions of the Use Tax Act and the orders of the Iowa State Board of Assessment and Review in connection therewith and a copy of said order shall be transmitted to the Secretary of State with the request that your permit to do business within the State of Iowa shall be revoked.

You are further notified that at the hearing to be held at the time and place above specified you may appear and show cause, if any you have, why the orders contained in

the Resolution and Order attached thereto or the orders above referred to, or any of them, should not be made and enforced.

You will govern yourselves accordingly.

Iowa State Board of Assessment and Review,
(Signed) Louis E. Roddewig, Chairman.

[fol. 30] State of Iowa,
Polk County, ss:

I, H. W. Hicks, being first duly sworn on oath state that on the 30th day of March, 1938, I served the within notice to which was attached a true and correct copy of the Resolution and Order of the Iowa State Board of Assessment and Review dated the 30th day of March, 1938, and marked Exhibit "A" upon Sears-Roebuck & Company by delivering a true and correct copy of said Notice and Resolution and Order attached thereto and offering to read the original, which reading was waived, to E. R. Shapiro, who is the manager of the Des Moines retail branch maintained by Sears-Roebuck & Company, and who is an agent in this State engaged in the transaction of Sears-Roebuck & Company's business.

(Signed) H. W. Hicks.

Subscribed and sworn to before me, a Notary Public in and for Polk County, Iowa, this 30th day of March, 1938. (Signed) Elsie L. Dichrooth, Notary Public in and for Polk County, Iowa. (Seal.)

Exhibit "D"

Copy of Sections 8420 to 8432, inclusive, Chapter 386 Code of Iowa 1935.

Exhibit "E"

Copy of Section 11, Chapter 196, Acts of the 47th General Assembly.

EXHIBIT "F"

Copy of Section 16, Sub-paragraph 2, Chapter 196, Acts of the 47th General Assembly.

[fol. 31] On the 13th day of October, 1938, the Court entered the following order:

ORDER FOR ALLOWANCE OF TEMPORARY INJUNCTION

On this 13th day of October, 1938, the above entitled cause comes on for hearing before the undersigned on the application of the plaintiff for the allowance of a temporary injunction, the plaintiff appearing by Gamble, Read, Howland & Rosenfield, its attorneys, and the defendants appearing by John H. Mitchell, Attorney General of Iowa, and Charles W. Wilson and Charles E. Bookin, Assistant Attorney Generals.

Whereupon the attorneys for the plaintiff presented to the court the verified petition of the plaintiff on file, and moved for the immediate allowance of a temporary injunction in accordance with the prayer of said petition.

And after having examined said petition and heard the statements and arguments of counsel for the respective parties, the Court Finds that it has jurisdiction of the parties and of the subject matter of this cause and that an order for the allowance of a temporary injunction should issue as prayed in plaintiff's petition.

Therefore, it is Ordered and Adjudged: That the defendants, Louis E. Roddewig, as Chairman of the Iowa State Board of Assessment and Review, and individually, and D. L. Murrow and C. Frank Green, as members of the Iowa State Board of Assessment and Review, and individually, and their agents, servants and employes and all other persons acting through or under their authority or the authority of their offices, be temporarily enjoined and restrained, and until the further order of the Court, from doing any and each of the following acts:

[fol. 32] (a) Making or entering any finding or order that plaintiff has failed to comply with the purported requirements of the order of said State Board of Assessment and Review dated March 30, 1938;

(b) Making any finding that plaintiff has failed to comply with the provisions of the Iowa Use Tax Law;

(c) Revoking or canceling any sales permit issued to plaintiff covering the operation of its retail stores within the State of Iowa.

(d) Certifying or transmitting to the Secretary of State of the State of Iowa any order or finding with respect to plaintiff's alleged failure to comply with the laws of Iowa with respect to the collection of the so-called "Use Tax", or making any request upon the Secretary of State for the revocation of plaintiff's license to do business within said State as a non-resident corporation; and

(e) Taking any action for the enforcement of the so-called "order" of the Iowa State Board of Assessment and Review dated March 30, 1938, or disturbing the property or position of plaintiff with re-pect to its business in the State of Iowa as the result of any failure or refusal on the part of plaintiff to comply with the provisions of the so-called "Iowa Use Tax Act", as construed and applied by the defendants;

this temporary injunction to be effective and the writ of injunction to issue upon the filing of a bond, as provided by law, in the principal sum of twenty thousand dollars ($20,000.00) with sureties to be approved by the Clerk of this Court, and conditioned that the plaintiff will pay all damages that may be adjudged against it by reason of the issuance of such temporary injunction.

[fol. 33] Further Ordered that upon the filing of such bond and the approval of the surety or sureties thereon by said Clerk a writ of injunction directed to the defendants in their individual and official capacities shall issue out of the office of the Clerk of this Court as provided by law and this order.

Dated this 13th day of October, 1938.

(Signed) John J. Halloran, Judge.

Writ of Injunction was issued pursuant to the foregoing Order on October 17, 1938.

On December 21, 1938, the defendants filed the following Answer:

ANSWER

Come now the defendants in the above entitled cause and for answer to the plaintiff's petition admit, deny, and states as follows:

1. The defendants admit each and every allegation not hereinafter denied, modified or qualified.

2. The defendants specifically deny that part of paragraph 3 of the petition wherein the plaintiff alleges and avers as follows:

"When it entered the State of Iowa and commenced to transact business therein, and since, and when it expended money in equipping and stocking its stores within said state, and when it obligated itself under said long-term leases, plaintiff relied upon the rights and privileges given and inuring to it by and under said permit or contract, in the light of the statutes and Constitutions of the State of Iowa and of the United States."

[fol. 34] and defendants state that the plaintiff in originally entering the State of Iowa did so with full knowledge that it would be subject to all proper laws and regulations which might thereafter be imposed upon the plaintiff by the Legislature of the State of Iowa. That the plaintiff entered the State of Iowa under a license or permit to do business within the State and that said license or permit was subject to the provisions of Chapter 386 of the Code of Iowa and specifically Section 8432 thereof, which section is set out in Exhibit "D" of the plaintiff's petition and is by reference thereto hereby made a part hereof.

That the plaintiff in making application for a permit to transact business in the State of Iowa signed an application and statement seeking such permission. That the provisions of said application provided that said certificate or permit "when issued, shall be subject to, and subject this company to, all the provisions of the statutes of Iowa relating to corporations for pecuniary profit." Attached hereto marked Exhibits "A" and "B" and hereby made a part hereof by reference thereto are true and correct photostatic copies of the application and statement executed

and filed by the plaintiff with the Secretary of State of the State of Iowa and upon which a permit or certificate authorizing the plaintiff to transact business in the State of Iowa was issued.

That under the provisions of the laws of the State of Iowa and specifically Section 8376, Chapter 384 Code of Iowa 1927 (same Code of Iowa for 1935) the plaintiff at the time of entering the State of Iowa agreed to be bound by the provisions and requirements contained in said section which reads as follows:

"8376. Legislative control.—The articles of incorporation, by-laws, rules and regulations of corporations here-[fol. 35] after organized under the provisions of this title, or whose organization may be adopted or amended hereunder, shall at all times be subject to legislative control, and may be at any time altered, abridged or set aside by law, and every franchise obtained, used, or enjoyed by such corporation may be regulated, withheld, or be subject to conditions imposed upon the enjoyment thereof, whenever the general assembly shall deem necessary for the public good."

That said license to do business within the State of Iowa issued to the plaintiff did not then and does not now constitute a contract with the State of Iowa but is simply a license or permit issued to the plaintiff authorizing it to do business within the State of Iowa subject, however, to all of the provisions of the statutes of Iowa then or thereafter made applicable to domestic corporations for pecuniary profit organized under the laws of the State of Iowa and also subject to the liabilities, restrictions or duties which were or thereafter might be imposed upon domestic corporations of like character. That the Iowa Use Tax Act, Exhibit "A" of the petition imposes the same liabilities, restrictions and duties upon domestic corporations of like character as are imposed by it upon the plaintiff. That no rights or privileges were ever given to or conferred upon plaintiff by virtue of the license or permit issued to it authorizing it to transact business within the State of Iowa other than that it might enter the State of Iowa and transact business therein, subject however to all then existing or thereafter validly enacted statutes of the State of Iowa.

3. That as to that portion of paragraph 4 of the petition wherein the plaintiff alleges and avers that it has collected

[fol. 36] and paid to the State of Iowa use tax on all orders accepted by it at its retail establishments within the State and filled by it from outside the State, the defendants state, that said sum of $7,853.02, which purportedly represents the use tax due upon such sales and upon merchandise purchased by the plaintiff for use within the state from the period of April 16, 1937, to March 31, 1938, was paid by the plaintiff on the 4th day of June, 1938. That said payment was made one month after action was instituted in Federal Court and was the first payment made by the plaintiff of the use tax heretofore collected by itself, and which should have heretofore been paid by the plaintiff at the time when the same was due, in accordance with the provisions of the Iowa Use Tax Act.

4. That the defendants have neither knowledge, information, nor belief concerning the truth or correctness of the allegations of paragraph 5 of the petition and therefore deny the allegations and averments contained in said paragraph and ask that the plaintiff be required to give strict proof thereof.

Further answering said paragraph 5 the defendants state that the quotation of price, if any, designated in the plaintiff's catalog as F.O.B. a specified point is merely price fixing and not an indication of the source or place of shipment. That the plaintiff is not required to ship said merchandise from without the State of Iowa, but is free to fill said orders from its retail establishments within the State of Iowa. That the purpose of Sears, Roebuck & Company in refusing to comply with the provisions of the Use Tax Act is to employ its branch retail establishments within the State of Iowa and its retail establishments without the State of Iowa as a means of attempting to circumvent the Sales Tax Act and Use Tax Act of Iowa and as a means of offering its Iowa customers a two per cent differential on all [fol. 37] purchases made by said Iowa customers from it over like purchases said customers might make from other Iowa retailers who do comply with the Iowa Retail Sales Tax Act and the Iowa Use Tax Act.

5. That the defendants have neither knowledge, information nor belief concerning the truth or correctness of paragraph 6 of the petition and therefore deny the allegations and averments contained in said paragraph.

6. By way of answer to paragraph 7 of the petition the defendants admit that certain mail order sales made by the plaintiff constitute sales in interstate commerce but the defendants specifically deny that the Iowa Use Tax Law in any way burdens or regulates such sales or requires the plaintiff to obtain a license to engage in such sales.

7. The defendants specifically deny that part of paragraph 8 of the petition reading as follows:

"By the provisions of Section 8 of said Use Tax Act, every retailer maintaining a place of business within the State and making sale of tangible personal property for use within the State where such sales are not exempted under the provisions of Section 3 thereof, nor collectible under the provisions of Section 6 thereof, is required at the time of making such sales 'whether within or without the State', to collect the tax imposed by the Act from the purchaser and give to the purchaser a receipt therefor in the manner and form prescribed by the Iowa State Board of Assessment and Review."

and by way of answer to said allegations of the petition state that the provisions of Section 8 of Chapter 198 of the Acts of the Forty-seventh General Assembly of the State of Iowa, familiarly known as the "Use Tax Act" with refer- [fol. 38] ence to the time of collecting any tax imposed thereby are merely directory and not mandatory; that in accordance with the canons of statutory construction its language is susceptible of such interpretation without contravening the prohibition of the Federal organic law, and has been and is so interpreted by the defendants as a matter of administrative practice.

8. The defendants have neither knowledge, information, nor belief concerning the truth or correctness of the allegations contained in paragraph 8 at page 9 of the petition, reading as follows:

"But plaintiff has never collected nor paid the so-called use tax upon its mail order sales made from its Chicago, Illinois, store or other stores or branch warehouses or factories located outside the State of Iowa, for shipment to persons located within the State of Iowa pursuant to orders so sent by such persons to such stores or warehouses or factories, outside the State of Iowa."

and therefore deny the same and ask that the court require strict proof from the plaintiff concerning the same.

9. The defendants have neither knowledge, information, nor belief concerning the truth or correctness of the allegations contained in paragraph 9 of the petition and therefore deny the same and ask that the court require strict proof from the plaintiff concerning the same.

10. The defendants specifically deny the allegations and averments of paragraph 10 of the petition and state that they have never construed said statute as authorizing and empowering them to require plaintiff at the time of making sales to charge and collect from its mail order customers located within the State of Iowa the Iowa Use Tax. The [fol. 39] defendants aver and state that they have at all times construed that portion of Section 8 of the Iowa Use Tax Act wherein it is provided that every retailer maintaining a place of business in this State and making sales of tangible personal property for use in this State shall at the time of making such sales collect the tax imposed by this Act as being purely directory as to the time when the said tax shall be collected. That the defendants have at all times construed the Act as requiring the collection of the tax by the retailer after the tangible personal property has come to rest within the State of Iowa and has been put in use within the State of Iowa by the purchaser thereof. That the defendants have never attempted to apply the Iowa Use Tax as a burden or restriction upon the operation of interstate commerce, but have construed said tax to apply solely to the privilege of use after the commerce is at an end.

The defendants further state that the requirement that the plaintiff collect the tax is not an attempt to regulate the conduct of its business without the boundaries of the State of Iowa and said tax does not in any manner impose an unconstitutional burden either upon interstate commerce or upon the plaintiff by virtue of the fact that the plaintiff is required to collect said tax.

11. The defendants specifically deny that portion of the allegations and averments of paragraph 11 reading as follows:

"Plaintiff alleges that if said hearing before the Iowa State Board of Assessment and Review is held, that said Board will make a finding that petitioner has violated the

provisions of the Use Tax Act by failing and refusing to collect upon its mail order sales to persons within the State of Iowa the so-called 'Iowa Use Tax' amounting to two per [fol. 40] cent thereof, and because of said alleged violation defendants will revoke the plaintiff's license as a retailer under the Iowa Sales Tax Act, and will certify to the Secretary of State of the State of Iowa a copy of its order finding that plaintiff has failed to comply with the order of said Board, and that by the provisions of Section 21 of the Use Tax Act, upon receipt of such certification it is made the mandatory duty of the Secretary of State of the State of Iowa to revoke plaintiff's license and qualifications to do business as a foreign corporation within the State of Iowa."

and state that said order, Exhibit "B" attached to the petition and the Iowa Use Tax Act gave to the plaintiff a complete administrative remedy and an opportunity to show cause why the orders contained in said Exhibit "B" should not be made. That plaintiff could have appeared at the time and place designated in said order and urged every defense that it here urges and the same would have been considered and then and only then would the Board of Assessment and Review have decided upon its course of procedure relative to the action to be taken.

12. The defendants specifically deny that portion of paragraph 11 beginning on page 13 of the petition and reading as follows:

"That the said license or permit so granted to plaintiff to transact business within the State of Iowa as a foreign corporation under the circumstances hereinbefore alleged, and the said several permits so granted to plaintiff to conduct its retail merchandising business in each of its twelve stores located within the State of Iowa under the circumstances hereinbefore alleged, constitute property rights and [fol. 41] valid and subsisting contracts between the said State of Iowa and plaintiff; and the revocation of such permit to transact business in the State of Iowa as a foreign corporation and such permits to conduct a retail merchandise business in its said several stores in Iowa, will result in the deprivation by the State of Iowa of the property of plaintiff without due process of law, contrary to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and will result in the

impairment of the obligation of said contracts, contrary to the provisions of Section 10 of Article I, of the Constitution of the United States, which provides that no state shall pass any law impairing the obligation of contracts."

and the defendants state and aver that there never was a contract between the State of Iowa and the plaintiff corporation. That no charter was ever granted to the plaintiff by the State of Iowa, but that upon application for a permit to do business within the State of Iowa, as shown by Exhibits "A" and "B" hereto attached, a license was issued to the plaintiff which license permitted it to do business within the State of Iowa, subject, however, to all the statutes which then or might thereafter relate to domestic corporations for pecuniary profit or which might thereafter be imposed by the Legislature.

13. The defendants have neither knowledge, information, nor belief concerning the truth or correctness of the allegations contained in paragraph 12 of the petition and therefore deny the same and ask that the court require strict proof from the plaintiff concerning the same.

14. The defendants specifically deny all of the averments, allegations and conclusions of law of paragraph 13 of the petition and state that the defendants' interpretation and [fol. 42] construction of the Iowa Tax Act is wholly in accordance with the provisions of said Act and that neither the construction nor interpretation adopted, nor the Act, nor any provisions thereof, contravene any provisions of the United States Constitution, or any of the amendments thereto.

15. The defendants specifically deny paragraphs 14 and 15 of the petition and by way of answer the defendants state and aver that the plaintiff has an adequate, plain and speedy administrative remedy, and also a plain, speedy, and adequate remedy in the law courts of the State of Iowa. That the plaintiff has refused to avail itself of the procedure and machinery provided by the statutes of the State of Iowa and by the law courts of the State of Iowa, or to appear before the Iowa State Board of Assessment and Review and show cause why the plaintiff should not comply with the provisions of the Iowa Use Tax Act, but instead seeks to invoke the jurisdiction of the equity courts.

16. Further answering, the defendants aver and state that the Iowa Sales Tax Act, Chapter 196 of the Laws of the 47th General Assembly, a true and correct copy of which is hereto attached, marked Exhibit "C" and hereby made a part hereof and the Iowa Use Tax Act must be construed together in determining whether the Iowa Use Tax Act imposes a burden upon interstate commerce. That when so construed together, the defendants state and aver, that it is apparent, that the said Iowa Use Tax is not so measured or conditioned as to hamper the transactions of interstate commerce or discriminate against it, but rather that equality is the theme that runs through all the sections of the said Iowa Use Tax Act.

[fol. 43] Wherefore, the defendants pray the court to deny the relief asked by the plaintiff and to dismiss said petition at plaintiff's costs.

John H. Mitchell, Attorney General of Iowa; Charles Bookin, Special Assistant Attorney General; Charles W. Wilson, Assistant Attorney General, Attorneys for Defendants.

Exhibits Attached to Answer

Exhibit "A"

Application Resolutions and Statements by Foreign Corporation Desiring to Transact Business in the State of Iowa

Name of corporation: Sears, Roebuck and Co.

Postoffice address: 3333 Arthington Street, Chicago, Illinois.

Resolutions and Applications by Directors and Stockholders.

At a meeting of the (Directors or stockholders) Directors of Sears, Roebuck and Co., of Chicago, Illinois, held at Chicago, Illinois, on the 18th day of February, A. D. 1928, the following resolutions were adopted,—including application to the Secretary of State of the State of Iowa for authority to transact business in said state:

[fol. 44] Resolved, that a certified copy of the articles of incorporation of this company be filed with the Secretary of

State of the State of Iowa, with a request that a certificate be issued authorizing this company to transact business in the state of Iowa, it being understood and hereby agreed that the certificate or permit, when issued, shall be subject to, and subject this company to, all the provisions of the statutes of Iowa relating to corporations for pecuniary profit.

Resolved further, That service of process is hereby authorized to be made upon any of the officers or agents of this corporation, acting for or engaging in the transaction of its business within said state.

Resolved further, That two of the principal officers of this company be, and they are hereby authorized and directed to do any and all things necessary to carry into effect the provisions of these resolutions, also to prepare and execute, under oath, a statement showing the total authorized capital of this corporation, its paid-up capital, the total value of its assets and the value of its assets now in use in the state of Iowa; also the estimated total amount to be used in said state during the ensuing year.

R. E. Wind, Chairman of Meeting. Jno. Higgins, Secretary of Meeting.

EXHIBIT "B"

Statement

By two of the principal officers of Sears, Roebuck and Co. Company organized under the laws of the State of New York with principal place of business at 3333 Arthington Street, Chicago, Illinois.

Total authorized capital of above corporation	4,200,000 shares of no par value.
[fol. 45] Total paid-up capital of above corporation	$105,000,000.00
Total value of all assets of the above corporation, including money and property other than money, represented by capital, surplus, undivided profits, bonds, promissory notes, certificates of indebtedness, or other designation; whether carried as money on hand or in bank, real estate or personal property of any description	163,432,129.64

Total value of all property in use or held as investment in the State of Iowa at this time	None
Total value of money and all other property above corporation proposes or expects to make use of in the State of Iowa during the ensuing year	10,000.00

We, the undersigned (*) President, (*) and Secretary respectively, of Sears, Roebuck and Co., of Chicago, Illinois, hereby depose and say, each for himself, that the facts above set forth are true as we verily believe.

Witness our hands this 18th day of February, A. D. 1928.

R. E. Wind, President. Jno. Higgins, Secretary.

[fol. 46] State of Illinois,
Cook County, ss:

Subscribed in my presence and sworn to before me by the above named parties this 18th day of February, A. D. 1928.

C. L. Schenk, Notary Public in and for Cook County, and State of Illinois. My commission expires Nov. 29th, 1929. (L. S.)

Exhibit "C"

Copy of Senate File 316, Acts of the 47th General Assembly of the State of Iowa, entitled "Retail Sales Tax Act."

Evidence of Plaintiff, Sears, Roebuck & Company

Mr. Gamble: I would like to read into the record, largely for the purpose of preserving it, a stipulation which the parties have entered into:

Stipulation re Submission, etc.

"The parties to this cause, through their respective counsel, do stipulate and agree as follows:

"(a) That this cause may be submitted upon the petition of plaintiff and the answer of the defendants, and

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(* Designate the official position—President, Vice President, Secretary, Treasurer or Manager.)

"(b) That certain stipulation of facts this day entered into between the parties and filed as a part of the record, and

"(c) That the testimony of Harry A. Welsher, Theodore V. Houser and Charles E. Kallal for the plaintiff, and Jack T. Tincher for the defendants, given on the trial of the case of Sears, Roebuck & Company, complainant, vs. Louis E. Roddewig, as Chairman of the Iowa State Board of Assess-
[fol. 47] ment and Review, and individually, and D. L. Murrow and C. Frank Green, as Members of the Iowa State Board of Assessment and Review, and individually, defendants, No. 4646, in Equity, in the District Court of the United States, Southern District of Iowa, Central Division, as transcribed by Gordon L. Elliott, the shorthand reporter, shall be considered as the depositions of said witnesses and as depositions taken in this case which may be read in evidence, in whole or in part, by either party, and received subject to such objections as appear in said transcript to each of the questions and answers therein set out.

"(d) The photostatic reproductions of Exhibits '1' and '2' introduced by the defendants in said cause tried in the United States District Court for the Southern District of Iowa, Central Division, may be offered in evidence in this cause subject to such objections as may be made as to relevancy or materiality.

"Dated this 12th day of December, 1938."

In the stipulation, your Honor, a stipulation of facts this day entered into, is referred to, and also for the purpose of preserving that stipulation in the record, I desire to read it:

STIPULATION OF FACTS

"For the purpose of expediting the trial of the above entitled cause by eliminating the necessity of producing formal proof of the existence of certain facts, the parties to this cause, through their respective counsel, do stipulate and agree as follows:

"(1) That plaintiff in the ordinary conduct of the course of its business makes sales of tangible personal property to residents of or persons within the State of Iowa by one or more of the following described methods, to-wit:

[fol. 48] "Type 1. Direct Sales. Sales made in its retail stores located within the State of Iowa of such property out

of the stock of said store, payment therefor being made to said store by the purchaser, and such sales being subject to the Iowa Sales Tax.

"Type 2. Special Order—Ship Direct Sales. This method of sale is followed where a purchaser orders from one of plaintiff's retail stores in Iowa tangible personal property which is not carried by the store in stock, but which is carried by one of plaintiff's mail order establishments located outside of the State of Iowa. In this type of sale the order for the purchase is given to the local store, and payment therefor, including transportation charges from the shipping point, is made to the local store. The local store then orders shipment of the goods purchased to be made directly to the purchaser from one of plaintiff's mail order establishments; and the mail order establishment fills the order, charging the local store with the cost price of the goods, plus an amount to cover overhead expense in handling and shipping, plus the actual transportation charges. The purchase price paid to and received by the local store is retained by it and included in the volume of its gross sales.

"Type 3. Mail Order Sales. In this type of sale the purchaser, a resident or person in Iowa, after preparing his order or having it prepared for him, sends to one of plaintiff's mail order establishments located outside of Iowa a written order for the purchase and delivery to him in Iowa of one or more items of tangible personal property listed and priced in plaintiff's mail order catalogs, the order being accompanies by the remittance of the purchase price plus transportation charges, and the means of transportation [fol. 49] being customarily specified by the purchaser. The order is accepted or rejected, as the case may be, at the mail order establishment of plaintiff which received the order; and if the order is accepted it is filled by the direct shipment of the property purchased from said mail order establishment to the purchaser in the State of Iowa, delivery being accomplished through the United States mails or some common carrier of goods, such as specified by the purchaser.

"(2) For the purpose of this case, it is stipulated as a fact that plaintiff has failed and refused to collect from the purchaser to whom mail order sales as hereinbefore defined have been or are being made, the so-called use tax imposed by the Use Tax Act of the State of Iowa.

"And for the purposes of this case, plaintiff now concedes and stipulates as a fact that it is obligated to collect from the purchaser and remit to the State of Iowa either the sales tax or the use tax imposed on all types of sales made by it to residents of or persons within the State of Iowa, excepting on mail order sales hereinbefore defined as Type 3.

"(3) For the purposes of this case, it is further stipulated as a fact that: On or about the 2nd day of June, 1938, plaintiff made to the Iowa State Board of Assessment and Review so-called Retailer's Use Tax Returns for the quarterly periods ending June 30, 1937, September 30, 1937, December 31, 1937, and March 31, 1938; and at the same time paid under protest to said Board the sum of $7,853.02. That said returns purported to show, and that the sum of money thus paid purported to be, the correct amount of the use tax exacted under the terms and provisions of the Iowa [fol. 50] Use Tax Act for the periods mentioned in said returns, for sales of tangible personal property identified as Type 2 in the preceding paragraph of this Stipulation, and also the use tax exacted on account of tangible personal property purchased by plaintiff outside of the State of Iowa but used by plaintiff within the State of Iowa and subject to the said Iowa Use Tax Act. That the said returns thus filed and the payment of money thus made by plaintiff were provisionally accepted by the Iowa State Board of Assessment and Review as correct, but as subject to final adjustment in the usual course of the administration of the said Iowa Use Tax Act.

"Either party to this cause may file this stipulation as a part of the record and the same, if filed, shall constitute part of the record and be considered as proof of the facts therein stipulated. The opposite party shall have the privilege of objecting, at the time that the said stipulation is filed, to any of the facts stipulated on the grounds that the same are irrelevant or immaterial.

"Dated this 12th day of December, 1938."

Mr. Bookin, attorney for defendants, offered in evidence Exhibits "1" and "2". By stipulation the transcript of the shorthand notes of the evidence taken by Gordon L. Elliott, shorthand reporter and referred to in the stipulation was offered in evidence by both parties as Exhibit "A", the plaintiff reading into the evidence the testimony of the witnesses, Harry A. Welsher, Theodore V. Houser

and Charles E. Kallal, and the defendant reading into the evidence the testimony of Jack T. Tincher. The offers included the cross examination of said witnesses all as shown by the transcript.

[fol. 51] **Defendants' Exhibits**

Exhibit "1"

Application Resolutions and Statements By Foreign Corporation Desiring to Transact Business in the State of Iowa

Name of corporation Sears, Roebuck and Co.

Postoffice address, 3333 Arthington Street, Chicago, Illinois.

Resolutions and Applications by Directors and Stockholders.

At a meeting of the (Directors or Stockholders) Directors of Sears, Roebuck and Co. of Chicago, Illinois, held at Chicago, Illinois, on the 18th day of February, A. D. 1928, the following resolutions were adopted,—including application to the Secretary of State of the State of Iowa for authority to transact business in said state.

Resolved, that a certified copy of the articles of incorporation of this company be filed with the Secretary of State of the State of Iowa, with a request that a certificate be issued, authorizing this company to transact business in the state of Iowa, it being understood and hereby agreed that the certificate or permit, when issued, shall be subject to, and subject this company to, all the provisions of the statutes of Iowa relating to corporations for pecuniary profit.

Resolved further, That service of process is hereby authorized to be made upon any of the officers or agents of this corporation, acting for or engaging in the transaction of its business within said state.

[fol. 52] Resolved further, That two of the principal officers of this company be, and they are hereby authorized and directed to do any and all things necessary to carry into effect the provisions of these resolutions, also to prepare and execute, under oath, a statement showing the total authorized capital of this corporation, its paid-up capital, the total value of its assets and the value of its assets now in use in the state of Iowa; also the estimated total amount to be used in said state during the ensuing year.

R. E. Wind, Chairman of Meeting. Jno. Higgins, Secretary of Meeting.

Statement

By two of the principal officers of Sears, Roebuck and Co. Company organized under the laws of the State of New York with principal place of business at 3333 Arthington Street, Chicago, Illinois.

Total authorized capital of above corporation 4,200,000 shares of no part value.	
Total paid-up capital of above corporation	$105,000,000.00
Total value of all assets of the above corporation, including money and property other than money, represented by capital, surplus, undivided profits, bonds, promissory notes, certificates of indebtedness, or other designation; whether carried as money on hand or in bank, real estate or personal property of any description	163,432,129.84
Total value of all property in use or held as investment in the State of Iowa at this time	None
[fol. 53] Total value of money and all other property above corporation proposes or expects to make use of in the State of Iowa during the ensuing year	10,000.00

We, the undersigned (*) President, (*) and Secretary respectively, of Sears, Roebuck and Co., of Chicago, Illinois, hereby depose and say, each for himself, that the facts above set forth are true as we verily believe.

Witness our hands this 18th day of February, A. D. 1928.

R. E. Wind, President. Jno. Higgins, Secretary.

State of Illinois,
Cook County, ss:

Subscribed in my presence and sworn to before me by the above named parties this 18th day of February, A. D. 1928.

C. L. Schenk, Notary Public in and for Cook County and State of Illinois. (L. S.) My commission expires Nov. 29th, 1929.

(*Designate the official position—President, Vice President, Secretary, Treasurer or Manager.)

[fol.54] Exhibit "J"

Part 1

Domestic Corporations Registered Under Section 8 of Iowa Personal Property Use Tax Law for Sales from Out-of-State Institutions for Use in Iowa

Reg. No.	Name and Address	Tax Paid
100013	A. Y. McDonald Mfg. Co., Dubuque, Iowa	No Tax
100021	Beauty Utilities of Iowa, Waterloo, Iowa	$ 189.00
100045	Shotwell-Carver Co. Inc., Des Moines	262.28
100077	Consumers Coal & Supply Co., Dubuque, Iowa	No Tax (Canc.)
100078	L. W. Ramsey Co., Davenport, Iowa	11.49
100079	Clay Equipment Corporation, Cedar Falls, Iowa	No Tax
100080	Oskaloosa Ice Co., Oskaloosa, Iowa	No Tax (Canc.)
100081	Schoitz Engineering Works, Inc., Waterloo, Iowa	No Tax
100082	City Coal Company, Albia, Iowa	No Tax (Canc.)
100083	Electrical Engineering & Const. Co., Des Moines, Iowa	No Tax
100086	Drake Hardware Company, Burlington, Iowa	No Tax
100088	Fullmer Builders Supply Co., Ottumwa, Iowa	No Tax (Canc.)
[fol.55]		
100089	Citizens Service Company, Swea City	No Tax
100095	Farmers Grain Co., Larchwood, Iowa	No Tax
100097	Berry Lumber Co., Onawa, Iowa	No Tax (Canc.)
100098	Automatic Gravel Products Co., Muscatine, Iowa	No Tax
100099	Sibley Cement Company, Sibley, Iowa	83.29
100100	Shell Lumber Company, Sibley, Iowa	.98
100101	Will H. Zaiser Specialty Co., Des Moines, Iowa	No Tax
100102	The Mastercraftsmen, Inc., Des Moines, Iowa	No Tax
100103	Berkowitz Envelope Co. of Iowa, Des Moines, Iowa	1.77
100104	The McGregor Company, Oskaloosa, Iowa	No Tax
100105	General Air Conditioning Corp., Cedar Rapids, Iowa	No Tax
100106	Castone Products Co., Cedar Rapids, Iowa	No Tax
100107	Tribune Publishing Co. Inc., Cedar Rapids, Iowa	No Tax
100108	The Luberger Company, Cedar Rapids, Iowa	No Tax
100109	H. Trenkle Co., Dubuque, Iowa	49.71
100110	Metz Manufacturing Co., Dubuque, Iowa	No Tax
100111	The National Yeast Co. Inc., St. Olaf, Iowa	No Tax

EXHIBIT "2"—Part 1—Continued

Reg. No.	Name and Address	Tax Paid
[fol.56]		
100112	Niemeyers, Hawarden, Iowa	No Tax (Canc.)
100113	Manning McComb Co., Des Moines, Iowa	No Tax (Canc.)
100114	Pure Ice Company, Centerville, Iowa	No Tax
100115	Amana Society, Amana, Iowa	No Tax (Canc.)
100116	Master Ref. Locker Systems, Sioux City, Iowa	No Tax
100117	T. R. Curney Oil Company, Sioux City, Iowa	2.88
100118	The Phillip Bernard Co., Sioux City, Iowa.	1.75
100119	Johnson Biscuit Co., Sioux City, Iowa	No Tax (Canc.)
100121	Lehigh Sewer Pipe & Tile Co., Ft. Dodge, Iowa	24.18
100120	L. O'Harrow Co., Sioux City, Iowa	No Tax (Canc.)
100122	Chas. Naeckel's Sons Co., Davenport, Iowa	No Tax
100123	Sieg-Mason City Co., Mason City, Iowa.	No Tax (Canc.)
100124	Palmer School of Chiropractic, Davenport, Iowa	172.32
100125	U. S. Broom Company, Inc., Davenport, Iowa	No Tax
100126	Coughlin Sales Company, Davenport, Iowa	No Tax
100127	Strieter Motor Company, Davenport, Iowa	No Tax
100128	Red Jacket Manufacturing Co., Davenport, Iowa	No Tax
[fol.57]		
100130	Omaha Standard Body Corp., Council Bluffs, Iowa	3.02
100133	Des Moines Steel Bldg. Co., Des Moines, Iowa	1,100.71
100136	Luana Farmers Coop. Society, Luana, Iowa	No Tax
100137	Uchtorff Weiser Co., Davenport, Iowa	109.81
100138	Florida Fruit Co., Dubuque, Iowa	No Tax (Canc.)
100139	Ben S. Noble Lumber Co., Ida Grove, Iowa	No Tax
100140	Rainbow Oil Co., Dubuque, Iowa	No Tax (Canc.)
100141	Kruber-Morgan Elec. Co., Cedar Rapids, Iowa	No Tax (Canc.)
100142	Star Spark Arrestor Co., Oskaloosa, Iowa.	No Tax (Canc.)
100143	Riverside Fuel Co., Davenport, Iowa	No Tax (Canc.)
100144	Kelling Wilkinson Oil Co., Davenport, Iowa	1.24
100147	Bartles-Shepherd Oil Co., Waterloo, Iowa.	59.49
100153	Johnson Service Company, Des Moines, Iowa	33.99
100161	The Advertising Novelty Co., Newton, Iowa	No Tax

EXHIBIT "2"—Part 1—Continued

Reg. No.	Name and Address	Tax Paid
100297	Grand Recreation Corporation, Des Moines, Iowa	10.19
100298	Des Moines Incubator Co., Des Moines, Iowa	.21
[fol.58]		
100309	The Van Meter Co., Cedar Rapids, Iowa	No Tax
Total Amount of Tax Paid		$2,048.48
Total Number of Retailers		63

Part 2

Foreign Corporations Registered Under Section 9 of Iowa Personal Property Use Tax Law for Collection of Tax on Sales for Use in Iowa

Reg. No.	Name and Address	Tax Paid
100092	Dimock, Gould & Co., Moline, Illinois	$ 239.78
100151	Lewis Mfg. Company, Walpole, Mass.	No Tax (Canc.)
100155	Iron Fireman Corporation, Cleveland, Ohio	No Tax
100230	Farmers Co-op. Oil Co., Canton, S. Dak.	17.75
100231	M. Engebretson, Sioux Falls, S. Dak.	No Tax
100238	The Texas Company, Lawrenceville, Ill.	11.62
100242	Paul Oldenburg Co., Elmore, Minn.	No Tax
100248	Producers Creamery of Moline, Moline, Illinois	228.86
100288	C. A. Dunham Company, Chicago, Illinois	347.59
[fol.59]		
100350	The Gregory Laboratory, White Hall, Ill.	18.95
100356	Ashe Lockhart, Inc., Kansas City, Mo.	1.59
100361	Haver-Glover Laboratories, Kansas City, Mo.	1.00
100368	Lyons Band Instrument Co., Chicago, Ill.	No Tax
100382	Claude Neon Federal Co., Chicago, Ill.	No Tax
Total Amount of Tax Paid		$ 867.14
Total Number of Retailers		14

Part 3

Out of State Firms (not Corporations) Registered for Collection of Tax under Sections of Iowa Personal Property Use Tax Law

Reg. No.	Name and Address	Tax Paid
100055	Associated Sales Distributors, Minn., Minn	$ 31.12
100063	Matthews Shirt Co., Chicago, Ill.	158.15
100292	C. C. Anker, Chicago, Ill.	4.19
100306	Harold Griffith, Livonia, Mo.	2.35 (Canc.)
100311	Manitowoc Knitting Mills, Manitowoc, Wis.	15.09

EXHIBIT 2—Part 3—Continued

Reg. No.	Name and Address	Tax Paid
100312	Edwin C. Barnes & Bros., Chicago, Ill.	No Tax
100352	Cleveland Studio, Omaha, Nebr.	No Tax
[fol.60]		
100377	D. D. Tarpy, Omaha, Nebr.	No Tax
100383	Hand Tooled Leather Co., Rockford, Ill.	No Tax
100388	Quincy Leather Company, Quincy, Ill.	No Tax
Total Amount of Tax Paid		$ 210.00
Total Amount of Retailers		10

Part 4

Mail Order Houses Registered Under Section 8 of Iowa Personal Property Use Tax Law but not Included in Statement for Foreign Corporations Operating Under This Section

Reg. No. 100006
Montgomery Ward & Co.
Chicago, Illinois

B-37	$ 8.38
C-37	116.50
D-37	80.31
A-38	1,339.56
Total	$1,544.75

Reg. No. 100366
Sears, Roebuck & Co.
Chicago, Illinois

B-37	$1,474.48
C-37	1,621.71
D-37	2,602.64
A-38	2,154.19
Total	$7,853.02

[fol.61]

Part 5

Iowa Residents (not Corporations) Registered Under Section 8 of the Iowa Personal Property Use Tax Law for Collection of Tax on Sales for Use in Iowa

Reg. No.	Name and Address	Tax Paid
100001	John M. Dunkerton, Des Moines, Iowa.	$ 52.47
100008	B. & M. Service Co., Des Moines, Iowa.	254.50
100019	Movie Photo Co., Des Moines, Iowa.	12.42
100036	Emory Jones, Des Moines, Iowa.	320.10
100049	Nowlin's Distributing Co., Des Moines, Iowa.	144.43
100066	Iowa Road Blg. Co., Des Moines, Iowa.	1,273.32
100069	Harry Waite, Hawarden, Iowa.	46.73
100152	Mrs. Elsia H. Carle, Muscatine, Iowa.	No Tax
100154	Miss Edith J. Cranston, DeWitt, Iowa.	5.53
100156	H. P. Braun, Des Moines, Iowa.	4.89
100157	V. V. Wonderling, S. Sioux City, Neb.	1.95

Exhibit 2—Part 5—Continued

Reg. No.	Name and Address	Tax Paid
100160	The Vernon Company, Newton, Iowa	No Tax
100162	R. W. Eldridge, Waterloo, Iowa	10.63
100168	Mr. and Mrs. Fred Merritt, Mapleton, Iowa	1.34
100169	W. H. Orr, Clear Lake, Iowa	3.71
[fol.62]		
100172	C. W. Stipp Co., Des Moines, Iowa	No Tax
100173	Miss Katharine Martin, Des Moines, Iowa	2.37
100175	Mrs. Nina B. Sugg, Clinton, Iowa	15.21
100176	Mollie Hird, Dubuque, Iowa	3.85
100177	Zita L. Baker, Cresco, Iowa	4.80
100174	Mrs. G. D. Suter, Des Moines, Iowa	1.85 (Canc.)
100180	Mrs. A. F. McCoy, Lanesboro, Iowa	6.42
100181	Mrs. H. D. Patterson, Nevada, Iowa	6.21
100182	Miss Grace Negus, Bainbeck, Iowa	4.23
100183	Nora Dundore, Perry, Iowa	1.77
100184	Mrs. Verva Bixler, Clarence, Iowa	8.58
100185	Blanche L. Paul, Muscatine, Iowa	17.79
100186	Ruth V. Adams, Marshalltown, Iowa	7.13
100187	Mrs. Henrietta H. Burnham, Griswold, Iowa	2.35
100188	Bertha L. Marsh, Cherokee, Iowa	10.26
100189	Elsie McNiel, Cedar Rapids, Iowa	5.87
100190	Johanah Larsen, Onawa, Iowa	2.60
100191	Mrs. J. L. Stewart, Maquoketa, Iowa	5.14
[fol.63]		
100192	Lillian Huntington Lockwood, Waterloo, Iowa	6.54
100193	Miss Laura M. Pedersen, Des Moines, Iowa	7.90
100195	Mrs. Marie T. Douglass, Cedar Rapids, Iowa	4.84
100196	Mrs. Lela O. Kish, Riverton, Iowa	1.45
100197	Mrs. Curtis Sutton, Anamosa, Iowa	7.68
100198	Belle C. Collett, Ottumwa, Iowa	2.20 (Canc.)
100200	Mrs. Cora H. Hill, Badger, Iowa	3.88
100202	Mrs. Ralph Janssen, Ackley, Iowa	3.65
100203	Anna Fitzgerald, Pocahontas, Iowa	3.18
100204	Estelle E. Claussen, Clinton, Iowa	3.55
100206	Mrs. O. M. Bundy, Cedar Rapids, Iowa	6.05
100207	Mrs. Grace Collins, Monmouth, Iowa	4.36 (Canc.)
100208	Mrs. Minnie Meier, Waukon, Iowa	2.19
100209	Mrs. Rose Severson, Davenport, Iowa	No Tax
100210	Mrs. Pearl Edwards, Marengo, Iowa	14.67
100211	Margaret Shanewise, Waverly, Iowa	6.51
100212	Farna E. Leeper, Newell, Iowa	5.66
100214	Mrs. Hilda Ruser, Bennett, Iowa	2.01
[fol.64]		
100216	Mrs. Bess Steinmetz, Muscatine, Iowa	4.42

Exhibit 2—Part 5—Continued

Reg. No.	Name and Address	Tax Paid
100217	Mrs. A. Lola Johnson, Waterloo, Iowa..	2.12 (Canc.)
100218	Thomas N. Naudain, Sioux City, Iowa..	18.20
100219	Mrs. E. L. Rhodes, Sioux City, Iowa....	9.32
100221	Miss Amanda Looft, Swea City, Iowa...	7.17
100222	Mrs. Angie B. Noble, Charles City, Iowa	35.60
100223	Mrs. Ida C. Bell, Sioux City, Iowa.....	13.86
100224	Miss Lena M. Johnson, Sioux City, Iowa	4.50
100226	Mrs. Ruth M. Edwards, Marengo, Iowa	17.75
100227	Mrs. Ruth Rice, Cedar Rapids, Iowa..	11.00
100229	Mrs. Lee McNamee, Geneva, Iowa....	2.37
100232	Mrs. Geo. S. Klahm, Davenport, Iowa.	3.45
100233	Miss Minnie Harrison, Waterloo, Iowa.	6.43
100234	Mrs. Teresa Peterson, Davenport, Iowa	16.27
100237	Kunie & Nelson, Malvern, Iowa.....	No Tax (Canc.)
100238	Hazel A. Clyde, Osage, Iowa.....	10.13
100244	Mrs. Bess Adams, Iowa City, Iowa....	6.34
[fol.65]		
100245	George E. Krepelka, Osage, Iowa.....	9.79
100246	C. A. Kay, Centerville, Iowa.....	.12
100247	Luella Wall, Des Moines, Iowa.....	13.60
100251	Mrs. Anna Bentrude, Waterloo, Iowa..	2.52
100253	Daisy Haney, Keosauqua, Iowa.....	1.71
100254	A. B. Carstensen, M. D., Linn Grove, Iowa.....	1.89
100255	Mary Ellen O'Mara, Fort Dodge, Iowa	2.79 (Canc.)
100256	Mrs. W. P. Donald, Ames, Iowa.....	No Tax
100257	Mrs. Nelle C. Culver, Anthon, Iowa...	10.97
100258	Mrs. Clara Ford, Burlington, Iowa....	11.82
100259	Mrs. Gertrude E. Dow, Davenport, Iowa.....	7.68
100260	Margaret Bower, Marble Rock, Iowa..	7.38
100261	Mrs. Alice D. French, Des Moines, Iowa	11.64
100262	Marion M. Kemp, Muscatine, Iowa...	No Tax
100264	Mrs. Viola M. Haddad, West Union, Iowa.....	5.34
100265	Mrs. Clarence Van Wechel, Orange City, Iowa.....	3.95
100266	Mrs. R. C. Mahaffa, Des Moines, Iowa.	No Tax
100267	C. A Merritt, Clarence, Iowa.....	8.21
[fol.66]		
100268	Nellie M. Du Mond & Margaret, Waterloo, Iowa.....	29.54
100269	D. M. Stewart, Chapin, Iowa.....	No Tax
100271	Mrs. Vera K. Findly, Iowa City, Iowa.	21.67
100272	Mrs. Nettie F. Wood, Council Bluffs, Iowa.....	12.43
100273	Mrs. E. C. Eastin, Ft. Madison, Iowa..	14.24
100274	Mabel Garnsey, Sioux City, Iowa.....	6.02
100276	Mrs. Ethel M. James, Columbus Junction, Iowa.....	No Tax

Exhibit 2—Part 5—Continued

Reg. No.	Name and Address	Tax Paid
100277	Mrs. A. Dennison, Bellevue, Iowa	9.41
100278	Mrs. Helen Piffer, Indianola, Iowa	No Tax
100280	G. E. Offord, Clinton, Iowa	57.65
100283	Mrs. Mary Wilhite, Manning, Iowa	3.57
100284	Mrs. Delsie Berg, Fort Dodge, Iowa	No Tax
100285	Miss Effie Holt, Boone, Iowa	.37
100286	Mrs. Anna Schmidt, Davenport, Iowa	5.10
100287	Mrs. Frank Neely, Monroe, Iowa	5.22
100289	Mrs. Fay Mayo, Des Moines, Iowa	4.19
100290	Mrs. Henry O. Timmerman, Sheffield, Iowa	1.63
[fol.67]		
100291	Mrs. Laura Graham, Davenport, Iowa	1.84
100293	P. A. Graf, Mason City, Iowa	11.47
100295	Mrs. Mabel Kirchgatter, Iowa Falls, Iowa	3.30
100301	Mrs. T. A. Bell, Anita, Iowa	5.39
100303	Mrs. Emma B. Richardson, Washington, Iowa	23.00
100304	Daisy C. Rees, Ottumwa, Iowa	5.83
100308	Mrs. Maude Runkle, Lisbon, Iowa	3.52
100310	Miss Mabel M. Merritt, Ottumwa, Iowa	No Tax
100313	Isabel Hora, Boone, Iowa	.71
100324	Mrs. Jessie Densmore, Mason City, Iowa	5.02
100325	Mrs. T. L. Rogerson, Eagle Grove, Iowa	1.27
100328	Fred Golden, Burlington, Iowa	23.03
100329	Mrs. Sarah T. Schaefer, Fort Dodge, Iowa	No Tax
100330	Mrs. Vae S. Hawker, West Liberty, Iowa	5.11
100344	Wiley Whitehead, Marengo, Iowa	5.85
100351	Mrs. Anna Roach, Mapleton, Iowa	6.01
100362	Anna T. Mueller, Davenport, Iowa	1.71
100364	Mrs. A. J. Preston, Muscatine, Iowa	1.71
[fol.68]		
100367	Mortuary Supply Co., La Porte City, Iowa	No Tax
100369	Mrs. Elda Poppleton, Sioux City, Iowa	1.60
100370	Mrs. Norine Bensmiller, Ottumwa, Iowa	3.14
100373	Mrs. Eleanor T. Severance, Sutherland, Iowa	No Tax
100375	D. B. Tuttle, Decorah, Iowa	No Tax
100378	Miss Gladys Campbell, Mt. Pleasant, Iowa	No Tax
100381	M. A. Bates, Seymour, Iowa	No Tax
100384	Mrs. John Block, Burlington, Iowa	No Tax
100386	Peter E. Greten, Remsen, Iowa	No Tax
100393	Arthur E. Radabaugh, Colesburg, Iowa	No Tax
100394	Mrs. June Hutchcroft, Mediapolis, Iowa	No Tax

Exhibit 2—Part 5—Continued

Reg. No.	Name and Address	Tax Paid
100395	William Aberly, Riceville, Iowa	No Tax
100396	J. A. Jensen, Cresco, Iowa	No Tax
100397	Mrs. Art Kohl, Anamosa, Iowa	No Tax
100398	F. J. Merrill, Charles City, Iowa	No Tax
Total amount of tax paid		$2,880.15
Total number of retailers		136

[fol.69] Part 6

Foreign Corporations Registered for Collection of Use Tax Under Provisions of Section 8 of Iowa Personal Property Use Tax Law

Reg. No.	Name and Address	Tax Paid
100002	R. C. A. Mfg. Co., Inc., Camden, N. J.	$ 327.25
100003	Ohmer Register Co., Dayton, Ohio	71.51
100004	Illinois Oil Co., Rock Island, Ill.	578.25
100005	Westinghouse Electric Elevator Co., Chicago, Ill.	13.82
100007	The Liquid Carbonic Corp., Chicago, Ill.	1,146.75
100009	Singer Sewing Machine Co., New York, N. Y.	30.63
100010	Allis-Chalmers Mfg. Co., West Allis, Wisconsin	428.63
100011	U. S. Tire Dealers Mutual Corp., New York, N. Y.	23.07
100012	General Electric X-Ray Corp., Chicago, Ill.	1,093.61
100014	Toledo Scale Co., Toledo, Ohio	No Tax
100015	Carbide & Carbon Chemicals Corp., New York, N. Y.	87.73
100016	The Linde Air Products Co., New York, N. Y.	176.11
100017	The Prest-O-Lite Co., Inc., New York, N. Y.	72.98
100018	Burroughs Adding Machine Co., Detroit, Michigan	3,266.30
[fol.70]		
100020	Skelly Oil Co., Kansas City, Missouri	No Tax
100022	International Bus. Machine Corp., New York, N. Y.	545.21
100023	Ideal Equipment Co., Morristown, Minn	7.79
100024	Lowry-Miller Lumber Co., Princeton, Missouri	No Tax
100025	American-LaFrance & Foamite Industries, Inc., New York, N. Y.	248.33
100026	Fruehauf Trailer Co., Detroit, Michigan	No Tax (Canc.)
100027	The Michigan Silo Co., Peoria, Ill.	204.70
100028	J. D. Adams Co., Indianapolis, Ind.	3,568.37

EXHIBIT 2—Part 6—Continued

Reg. No.	Name and Address	Tax Paid
100029	Des Moines Nettleton Co., Inc., Syracuse, N. Y.	No Tax (Canc.)
100030	Penn Oil & Supply Co., St. Joseph, Missouri	153.02
100031	Griffin Wheel Co., Chicago, Illinois	737.53
100032	Marchant Calculating Co., Emeryville, Calif.	20.00
100033	Monumental Sales & Mfg. Co., St. Cloud, Minn.	1,264.90
100034	Portable Elevator Mfg. Co., Bloomington, Ill.	No Tax
100035	Schmoller & Mueller Piano Co., Omaha, Nebr.	No Tax
[fol.71]		
100037	E. I. Du Pont De Nemours & Co., Wilmington, Delaware	429.69
100038	Underwood Elliott & Fisher Co., New York, N. Y.	701.51
100039	Cork Insulating Co., Chicago, Ill.	No Tax
100040	J. & R. Motor Supply Co., Chicago, Ill.	No Tax (Canc.)
100041	Viscosity Oil Co., Chicago, Illinois	76.01
100042	Jewell Tea Co., Inc., Barrington, Ill.	3,208.33
100043	Cook Paint & Varnish Co., Kansas City, Missouri	17.23
100044	Roy Bennett, Inc., Quincy, Ill.	No Tax (Canc.)
100046	Decorators Wall Paper Co., Inc., St. Louis, Missouri	No Tax
100047	Sanitary Scale Co., Belvidere, Ill.	33.35
100048	Ed. Friedrich Sales Corp., San Antonio, Texas	29.48
100050	General Tire & Rubber Co., Akron, Ohio	271.41
100051	Ditto, Inc., Chicago, Ill.	525.57
100052	Continental Car-Na-Var Corp., Brasil, Ind.	76.69
100053	Lewistown Pipe Co., Ft. Wayne, Ind.	No Tax
100054	The B. F. Goodrich Co., Akron, Ohio.	132.37
100056	Compex Company, Chicago, Ill.	No Tax
100057	Clarin Mfg. Co., Chicago, Ill.	49.82
[fol.72]		
100058	Monroe Calculating Machine Co., Inc. Orange, N. J.	107.73
100059	Ceco Steel Products Corp., Omaha, Neb.	641.19
100060	Standard Oil Co., Chicago, Ill.	8,460.15
100061	Goodman Jewelers Inc., St. Paul, Minn.	No Tax
100062	Allied Laboratories, Inc., Kansas City, Mo.	1,776.14
100064	Wheeling Corrugating Co., Wheeling, W. Va.	No Tax
100065	W. G. Woodward Co., St. Louis, Mo.	No Tax (Canc.)

EXHIBIT 2—Part 6—Continued

Reg. No.	Name and Address	Tax Paid
100067	Royal Typewriter Co., Inc., New York, N. Y.	12.38
100068	Fairbanks, Morse & Co., Omaha, Neb.	428.78
100070	H. N. Greis, Trustee, Deep Rock Oil Corp., Chicago, Ill.	163.97
100071	Storz Supply Co., Omaha, Nebraska	110.48 (Canc.)
100072	Shell Petroleum Corp., St. Louis, Mo.	1,200.77
100073	The Creamery Package Mfg. Co., Chicago, Ill.	1,024.48
100074	General Electric Co., Schenectady, N. Y.	5.53
100075	The J. B. Ford Sales Co., Wyandotte, Michigan	75.99
100076	Crane Co., Davenport, Iowa	510.24
100084	Air Reduction Sales Co., New York, N. Y.	60.27
[fol.73]		
100085	Frigidaire Division, Gen. Motors Sales Corp., Des Moines, Ia.	127.77
100087	Armour & Company, Chicago, Ill.	92.59
100090	Blue Valley Creamery Co., Chicago, Ill.	No Tax
100091	The City Ice & Fuel Co., Chicago, Ill.	23.90
100093	Socony-Vacum Oil Co., Inc., St. Louis, Missouri	99.10
100094	U. S. Sanitary Specialties Corp., Chicago, Ill.	126.04
100096	The Louis Allis Co., Milwaukee, Wisconsin	No Tax
100129	Sherman's Associated Stores Co., Cleveland, Ohio	No Tax
100131	American Type Founders Sales Corp., Elizabeth, N. J.	No Tax
100132	Eastman Kodak Stores, Inc., Des Moines, Iowa	No Tax (Canc.)
100134	Jageman-Bode Co., Keokuk, Iowa	No Tax (Canc.)
100135	Hinde & Dauch Paper Co., Sandusky, Ohio	No Tax
100145	Certain - Teed Products Corp., New York, N. Y.	667.54
100146	Western Newspaper Union, Sioux City, Iowa	No Tax
100148	Dutch Mill Oil Co., Madison, Wisconsin	8.97 (Canc.)
100149	Oliver Farm Equipment Sales Co., Chicago, Ill.	11.14
[fol.74]		
100150	T. E. Ibberson Co., Minneapolis, Minn.	818.70
100158	Kennedy & Parsons Co., Omaha, Nebr.	No Tax
100159	Westinghouse Electric Supply Co., Chicago, Ill.	697.58
100163	Crane Co., Sioux City, Iowa	380.08
100164	Atlas Powder Co., Wilmington, Delaware	9.53

EXHIBIT 2—Part 6—Continued

Reg. No.	Name and Address	Tax Paid
100165	The National Refining Co., Dubuque, Iowa	98.06
100166	The Austin-Western Road Machinery Co., Aurora, Ill	1,320.21
100167	General Electric Supply Corp., Bridgeport, Conn	No Tax
100170	Rock Island Fuel Co., Rock Island, Ill.	186.78
100171	The Todd Sales Co., Inc., Rochester, N. Y	146.52
100178	Durabilt Steel Locker Co., Aurora, Ill	94.25
100179	The National Cash Register Co., Dayton, Ohio	1,972.29
100194	Remington Rand Inc., Buffalo, N. Y	No Tax
100199	Line Material Co., South Milwaukee, Wis	127.68
100201	Wisconsin Great Lakes Coal & Dock Co., Milwaukee, Wis	56.78
100205	The Sprague Meter Co., Bridgeport, Conn	34.08
[fol.75]		
100213	James Mfg. Co., Fort Atkinson, Wisconsin	009.38
100215	Albert Pick Co., Inc., Chicago, Ill	589.95
100220	The Master Builders Co., Cleveland, Ohio	34.46
100225	Crane Co., Mason City, Iowa	208.72
100228	Central Oil & Grease Co., Rock Island, Ill	99.61
100235	Pure Carbonic, Inc., New York, N. Y	.32
100239	J. I. Case Co., Rock Island, Ill	23.55
100240	Honan-Crane, Inc., Lebanon, Ind	3.30
100241	Graybar Electric Co., Inc., New York, N. Y	3.65
100243	National Poster Exchanges, Inc., Omaha, Nebr	1.49
100249	Victor Adding Machine Co., Chicago, Illinois	No Tax
100250	National Carbide Corp., New York, N. Y	120.78
100252	James Stewart Corp., Chicago, Ill	No Tax (Canc.)
100263	Otis Elevator Co., St. Louis, Mo	89.84
100270	Standard Barber & Beauty Supply Inc., Omaha, Nebr	No Tax
100279	The Pure Oil Company, Chicago, Ill	No Tax
100281	Westinghouse X-Ray Company, Inc., Long Island City, N. Y	526.20
[fol.76]		
100282	Interstate Memorial Co., St. Cloud, Minnesota	8.61
100294	L. G. Balfour Co., Attleboro, Mass	52.86

EXHIBIT 2—Part 6—Continued

Reg. No.	Name and Address	Tax Paid
100298	Woodstock Typewriter Co., Chicago, Ill.	235.64
100299	The Kelley-Koett Mfg. Co., Inc., Covington, Ky	169.82
100300	Ralston Purina Co., Davenport, Iowa	No Tax (Canc.)
100302	Hercules Powder Co., Wilmington, Delaware	48.42
100305	Gehl Bros. Mfg. Co., West Bend, Wisconsin	No Tax
100307	Ed. Friedrich Sales Corp., San Antonio, Texas	No Tax (Canc.)
100314	Geo. H. Weyer, Inc., Kansas City, Mo.	528.97
100315	Real Silk Hosiery Mills, Inc., Indianapolis, Ind	958.58
100316	Armstrong Cork Products Co., Lancaster, Pa	216.66
100317	Kremers-Urban Co., Milwaukee, Wis.	No Tax
100318	Kinsley Laboratories, Kansas City, Mo.	.98
100319	Missouri Valley Serum Co., Kansas City, Kansas	.87
100320	The Fostoria Serum Co., Fostoria, Ohio	4.39
100321	Norden Laboratories, Lincoln, Neb.	207.60
[fol.77]		
100322	St. Joseph Veterinary Laboratories, St. Joseph, Mo	7.10
100323	Colorado Serum Co., Denver, Colorado	6.29
100326	Deep Rock Oil Corp. of Nebraska, Omaha, Nebraska	17.23
100327	Oliver Farm Equipment Co., Chicago, Ill	No Tax
100331	Stors Supply Corp., Omaha, Nebraska	34.29
100332	Will Ross, Inc., Milwaukee, Wis	No Tax
100333	Merchants Chemical Company, Omaha, Nebr	No Tax
100334	B. A. Railton Co., Chicago, Ill	113.46
100335	Universal Atlas Cement Co., Chicago, Ill.	No Tax
100336	Westinghouse Electric & Mfg. Co., Pittsburgh, Pa	No Tax
100337	The Corn States Serum Co., Omaha, Nebr	84.23
100338	V. Mueller & Co., Chicago, Ill	113.85
100339	Sunshine State Poultry Lab., Sioux Falls, S. Dak	12.85
100340	Paul B. Elder Co., Bryan, Ohio	3.64
100341	Grain Belt Supply Co., Omaha, Nebraska	14.69
100342	Physicians & Hospitals Supply Co., Minneapolis, Minn	159.05
100343	Natkin & Company, Des Moines, Iowa	77.85
100345	Farmers Merchants Oil Co., Ellsworth, Minn	No Tax

Exhibit 2—Part 6—Continued

Reg. No.	Name and Address	Tax Paid
[fol.78]		
100346	Jensen - Salsbery Laboratories, Inc., Kansas City, Mo.	150.10
100347	The S. E. Massengill Co., Kansas City, Mo.	190.22
100348	National Laboratories Corp., Kansas City, Kans.	1.36
100349	Corn Belt Serum Co., E. St. Louis, Ill.	.06
100353	R. J. Strasenburgh Co., Rochester, N. Y.	1.17
100354	The Warren-Teed Products Co., Columbus, Ohio	No Tax
100355	Sutliff & Case Co., Inc., Peoria, Ill.	374.30
100358	Armour & Co., Vet. Div., Kansas City, Kansas	No Tax (Canc.)
100359	Peoria Barber Supply Co., Peoria, Ill.	46.39
100360	A. W. Co., Inc., of Nebraska, Omaha, Nebr.	508.24
100365	National Theatre Supply Co., New York, N. Y.	152.60
100371	Liberty Laboratories, Inc., Omaha, Nebr.	4.08
100372	Miller-Hasselbalch Co., Omaha, Nebr.	No Tax
100374	Lederle Laboratories, Inc., New York, N. Y.	.95
100376	The Hobart Mfg. Co., Troy, Ohio	237.22
100379	Chemical Distributors, Inc., Chicago, Ill.	No Tax
[fol.79]		
100380	Hillyard Sales Co., St. Joseph, Mo.	No Tax
100385	Skelgas Co., Kansas City, Mo.	No Tax
100387	Nebraska Bridge Supply & Lumber Co., Omaha, Nebr.	No Tax
100389	Peerless Serum Co., Kansas City, Kansas	No Tax
100392	The Long Bell Lumber Co., Kansas City, Missouri	No Tax
100399	Universal Laboratories, St. Louis, Missouri	No Tax
Total amount of tax paid		$48,436.59
Total number of retailers		169

Part 7

Out of State Firms (not Corporations) Registered for Collection of Tax Under Section 9 of Personal Property Use Tax Law

Reg. No.	Name and Address	Tax Paid
100275	John J. Kroner, Chicago, Ill.	$ 11.98
100357	Guilfoil Serum Co., Kansas City, Kans.	13.66
100363	Dr. Paul Jucknies, Omaha, Nebr.	No Tax
100390	Nelson Laboratories, Sioux Falls, S. Dak.	No Tax
100391	Morton Products Co., Morton, Ill.	No Tax

EXHIBIT 2—Part 7—Continued

[fol.80]

Total amount of tax paid	$	25.64
Total amount of retailers		5

Recapitulation

	No. of Accounts	Tax Paid
Part 1	63	$ 2,048.98
Part 2	14	867.14
Part 3	10	210.90
Part 4	2	9,397.77
Part 5	136	2,880.15
Part 6	169	48,436.59
Part 7	5	25.64
Non-Registered Retailers Returns		100.81
Total	399	$63,967.98

EXHIBIT "A"

The same being a transcript by Gordon L. Elliott of the testimony taken in cause No. 4646—Equity in the District Court of the United States, Southern District of Iowa, Central Division, referred to in the stipulation, and the following is an abstract of testimony contained in said transcript.

HARRY A. WELSHER, a witness on behalf of the complainant (Sears, Roebuck & Company) having been first duly sworn by the clerk, testified as follows:

Direct examination:

I live in Elhurst, Illinois, and I am an auditor for Spiegel, Inc., located at 1061 W. 35th Street, Chicago, Illinois. I [fol. 81] have been an auditor with this company for the past twenty years. This company is engaged in the mail order business selling household furniture and wearing apparel. This company distributes catalogs to prospective customers twice a year and such catalogs are sent to people who are residents of Iowa. This company maintains no place of business within the State of Iowa but gets its orders by mail from customers, delivering to purchasers mainly through parcel post or freight. All shipments are made from Chicago, the company's only place of business. Dur-

ing the past year, sales made to Iowa residents amounted to approximately a million and a quarter dollars upon which no use tax was collected.

Cross-examination:

As auditor my particular job is the preparation of the financial statements and I have charge of the general books of the company. My estimate of a million and a quarter dollars was based on records we have in the office. We have no retail outlets in the State of Iowa, nor in any state other than the State of Illinois and Spiegel & Company has never made application to be designated as a withholding agent under the provisions of Section 9 of the Iowa Use Tax Act.

Redirect examination.

Our business is an installment business and records of sales are kept for that reason.

THEODORE V. HOUSER, called as a witness on behalf of the complainant (Sears, Roebuck & Company) having first been duly sworn by the Clerk, testified as follows:

[fol. 82] I am the general merchandise manager of Sears, Roebuck & Company located in Chicago, and I have been with the company approximately ten years. We have twelve stores in Iowa classified with reference to size and types of merchandise carried. There is one "A" store which is the largest store and carries a complete line; seven "B-1" stores, and four "B-2" stores. Sears, Roebuck & Company has mail order stores in Chicago, Minneapolis and Kansas City, Missouri, but no mail order stores in Iowa. Sears, Roebuck & Company mail catalogs to purchasers and in 1937 mailed out approximately 600,000 small catalogs and 427,000 large catalogs. Such catalogs are mailed to residents of Iowa. The company also sends prospective customers bulletins soliciting orders. The merchandise carried in the mail order stores differs from the merchandise carried in the retail stores in range of items and character of the merchandise carried. I have general supervision of the purchase and selection of the merchandise that is carried by the mail order concerns, the preparation

of the catalog and the preparation of the merchandise lists which are sent to the retail stores. We carry approximately 59,000 items in the mail order stores and an "A" retail store would carry about 19,000 items and a "B-1" retail store would average about 12,000 items and a "B-2" retail store about 9,000 items. With regard to the percentage of items which are carried in the several types of retail stores as compared to the items carried in the mail order stores, I will state that the smaller a store the larger the proportion of items that would be the same as the mail order items. In a "B-2" store approximately 70% of the items would be the same as we quote in the catalog; in the "B-1" store approximately 60% would be the same, and in the "A" store, such as we have in Des Moines, probably 45% would be the same. None of the stores which we have in [fol. 83] Iowa contain sufficient space to carry on therein successfully a mail order business.

Most orders contain more than one item and it would be impossible for a retail store to fill more than an exceedingly small percentage of multiple item orders.

I know of the concern called Spiegel's, Incorporated. I have been through their plant and know that they distribute catalogs and know that they conduct a mail order business selling the same range and the same different kinds of merchandise that we do. I know of a concern called the Chicago Mail Order House located in Chicago engaged in the mail order business and that they likewise distribute catalogs and their business is conducted under the usual mail order method. I know of a concern called the National Bellas Hess located in Kansas City, Missouri. I have been through their plant and their business is the same as the Chicago Mail Order House. I know of a concern called the Jim Brown Fencing Company located in Adrian, Michigan, and they sell by mail order, heavy lines such as hardware, mechanical lines, fencing, etc., and they sell by means of catalogs. Neither the Chicago Mail Order House, the National Bellas Hess Company, nor the Jim Brown Fence Company has any establishment in the State of Iowa. We consider them all in direct competition with Sears, Roebuck & Company. Assuming that neither Spiegel's Incorporated, nor the Chicago Mail Order House, nor the National Bellas Hess Company, nor the Jim Brown Fence Company did not collect 2% of the purchase price for use tax on sales made to residents of Iowa and the Sears, Roebuck Company did collect

such 2% use tax, then in my opinion the mail order business of Sears, Roebuck & Company would be seriously impaired through this 2% differential.

[fol. 84] Illinois has a sales tax and we collect that tax from Illinois customers. The Illinois tax has been in effect since 1933 and we collect the tax by pasting a tip on the cover of our catalogs as a notice to Illinois customers requesting them to include an amount to cover that tax and giving a schedule of the amount required for various amounts of orders. At the beginning something less than one-half sent any tax at all and today the percentage has grown from 1933 until approximately 65 per cent of our orders include an allowance for such a tax. Where orders were not accompanied by an amount to cover the sales tax in Illinois, we would fill the order and send the customer a "due us" slip requesting payment of the difference. We do not hold up the orders as this would be impossible from the standpoint of the operation of our plant.

We receive a large number of orders each day and put them through on a time schedule and there is no allowance or arrangement for withholding orders from that time schedule. It would substantially increase the cost of operating our business to hold such orders in suspension and it would require a major re-arrangement of the character of the business. Our experience is that we collect not more than 35% of the value of such "due us" shortages. Assuming that upon sales to residents of the State of Iowa through mail order, the use tax if applied would amount to $100,000 per year, then based upon our experience in the State of Illinois, the maximum amount that could be collected would be around $68,000. To do that would entail a direct cost within our business of approximately $13,700.00.

The compensation paid to a store manager is affected by the net profits of the store. The retail store located in Iowa gains no benefit and the manager's earnings are not affected [fol. 85] by the business coming from orders mailed by customers from Iowa to the mail order plants.

Cross-examination.

In Illinois the Sears, Roebuck & Company remit the full amount of the tax it should have collected to the State. By putting little notices in the front of the catalog, we have been able to collect 65% of the tax in the State of Illinois. If we

used the same method in the State of Iowa, I would say that we would collect out of $100,000 tax approximately $68,000. This would cost us about $18,000 made up of the cost of preparing forms, tipping the catalogs and extra correspondence. It took us five years to reach the 65% and we have employed no new technique in the matter of the collection of this tax. The cost of setting up accounts on our books for this tax would be more than the amounts involved, but I do not have anything to do with the running of the auditing department. The requirement that we collect the Illinois tax was not ruinous to our business in Illinois. These other companies, such as the Jim Brown Fence Company are not located in Illinois, but I do not know how much our business was affected by their competition in Illinois. The National Bellas Hess Company is located in Kansas City, but I do not know the effect of their Illinois business on our business even though we were required to collect the sales tax on Illinois orders.

Q. You don't know the effect. Then I take it that your entire line of testimony as to the effect on your business if you were required to collect the tax in the State of Iowa, the use tax, is just a matter of conjecture and speculation on your part, is it not?

A. No, sir.

Q. It is not. You have had actual experience with the sales tax and the collection of it in the State of Illinois and [fol. 86] you don't know how, if at all, it has affected your business in regard to competition with National Bellas Hess or the Jim Brown Fence Company?

A. I know what two per cent additional would do to our business in a state where we are in mail order competition with another firm that does not pay it.

In each store situated in Iowa there is a catalog station available for any person who would care to come to that store and inspect that catalog. Order blanks are kept at each store and a clerk will assist in filling out an order blank. In addition to the twelve retail outlets there are other catalog stations, but I do not know how many. There might be one or two.

The managers of the retail outlets are paid a definite salary and a bonus. The bonus being dependent upon the net profit of the particular store they manage. No credit would be given the local store by reason of an order sent to the mail order department from the catalog station or

store. The managers of our stores are permitted to arrange a bonus or commission for the clerks in the various departments if they desire to do so. I do not know what the usual practice is in Iowa. If a customer inquired from a clerk in the store as to whether or not he would have to pay a use tax upon an order, I believe the clerk would inform him that if he himself mailed the order that there would be no sales tax or use tax charged. By a bulletin sent to the stores on January 1, 1938, managers of the stores were notified that thereafter they were to collect the use tax from the customer on those orders sent by the local store to the mail order house for shipment direct to the purchaser. Prior to that time it had been the policy of Sears, Roebuck & Company not to require the collection of the use tax on those orders taken in the local stores and sent by the local stores to the mail order house for shipment direct to the purchaser. In [fol. 87] that bulletin there is no notice to purchasers that they would be required to send the use tax on orders sent direct by the purchaser to the mail order establishment.

Redirect examination:

As general manager of the merchandising department I do make a study of catalogs issued by competitors. Speigel's Incorporated and the Chicago Mail Order House are in direct competition with Sears, Roebuck & Company. This is also true of National Bellas Hess Company and the Jim Brown Fence Company, but to a lesser degree. The setting up of books and records with respect to the amount of the Iowa Use Tax would delay the filling of orders which we would consider a very serious matter. We try to get out 100 per cent of the orders the same day as received and we come within a small percentage of this. Price and speed of delivery are all important in the mail order business.

CHARLES E. KALLAL, called as a witness on behalf of the complainant, (Sears, Roebuck & Company) having been first duly sworn by the Clerk, testified as follows:

I have been with Sears, Roebuck & Company approximately seven years and ten months and I am now in charge of the sales and use tax division. Sears, Roebuck & Company do not keep any individual account of mail order ship-

ments to residents of the State of Iowa from the three plants located outside of the State. The approximate amount of those sales in a given year can be arrived at, however, by what we term the advance case ratio. As the orders are received in Chicago, Minneapolis and Kansas City the mail is opened and the case is run up on a register by key, this key designating the state from which [fol. 88] such order and cash is received. Thus we can arrive at a percentage although such things as adjustments or refunds would not be reflected in the aggregate total. Sometimes the remittance is short in which event we generally do not hold up the shipment, but we send along with this shipment a "due us" or a "you owe us" form for the shortage. By the advance cash ratio method I will state the approximate aggregate amount of the mail order sales in Iowa in orders received by mail and shipped from the Chicago, Kansas City and Minneapolis stores for the year 1937 amount to approximately $5,400,000. Of that amount approximately $2,280,000 represented shipments from the Chicago plant, $1,140,000 from the Kansas City plant and $2,000,000 from the Minneapolis plant. The average cash per order is determined weekly and in 1937 it was in the neighborhood of $4.00 cash received per order. Based on the general catalog distributions there were some 300,000 customers of Sears, Roebuck mail order department. For the year 1937 there were approximately 1,200,000 orders received from Iowa customers. In 1936 mail order sales to Iowa customers from the Chicago mail order house was 2,400,000, from the Kansas City mail order house, 1,200,000 and from Minneapolis, 2,250,000. The aggregate sales of retail stores located in Iowa in the year 1936 amounted to 5,080,000 and for 1937, 5,600,000.

Cross-examination:

In my position as manager of the sales and use tax division I gather tax data. The average case received per order is $4.00 and I have heard it remarked by one of the men in the accounting department that 92% of our business is cash, but I have never made any study of that. We distribute 300,000 large general catalogs to people in Iowa, but we have no record of the number of people to whom we [fol. 89] distribute the small catalog. I do have figures that make it approximately 50% more, or in other words I would

say 450,000. We received approximately 1,200,000 orders from Iowa customers, but we do not have any way of determining whether or not those orders were from the particular customers to whom we sent catalogs. The total of the mail order business of Sears, Roebuck & Company in 1936 for the United States was approximately two hundred million and in 1937 slightly over two hundred and two million. Sears, Roebuck & Company operates in 47 states and the District of Columbia and they do not collect any use tax imposed by the laws of any state on what we call direct mail orders sales. This gain in the retail business in the State of Iowa by the retail store is not an isolated case but inasmuch as the total retail sales have increased it might be presumed to be general and in line with the general trend in connection with our retail stores all over the United States. In 1936 our retail stores did approximately 325 million and in 1937, approximately 371 million, so there has been a gain of 46 million in 1937 over 1936 in connection with retail establishments as compared to a gain of two million in mail order establishments. By mail orders, we mean where the local customer himself places the order in the mail.

Mr. Bookin: Preliminary proof and identification having been waived, the defense now offers in evidence Exhibit No. "1", being pages 1 to 3 both inclusive.

Judge Sanborn: It will be received.

Jack C. Tincher, called as a witness on behalf of the defendants, having been first duly sworn by the Clerk, testified as follows:

I am an employe in the Iowa Sales and Use Tax Department under the Iowa State Board of Assessment and Review. I am in charge of the use tax department.

[fol. 90] Q. Mr. Tincher, at my request have you made a compilation from the official records in your charge of the names of the domestic corporations registered under Section 8 of the Use Tax Act, of the names of the foreign corporations registered under Section 9 of the Use Tax Act, of the out of state firms, not corporations, registered for collection of the tax, of the use tax, of the mail order houses registered under Section 8 of the Iowa Personal Use Tax Act maintaining retail establishments within the State of

Iowa, of Iowa residents not corporations registered under Section 8 of the Iowa Personal Property Use Tax law for collection of the tax on sales for use in Iowa, of foreign corporations registered for the collection of use tax under the provisions of Section 8 of the Iowa Personal Property Use Tax law, and of out of state firms not corporations registered for collection of the tax under Section 9 of the Personal Property Use Tax law, and of the amounts that each of these firms that so registered and designated in Exhibit "2" have paid to the State Board of Assessment and Review?

A. Yes, sir.

Q. I will ask you if Exhibit "2" is that compilation?

A. Yes, sir.

Q. Is it a true and correct compilation as taken from the books and records of the Iowa State Board of Assessment and Review under your control and charge?

A. It is.

Q. The records under your control and charge?

A. Yes, sir.

Mr. Bookin: In connection with the testimony of the witness Mr. Tincher, I now offer in evidence Exhibit "2".

Mr. Gamble: We do not object on account of the form to the offer of the exhibit, but we do object on the ground that it is immaterial.

[fol. 91] Judge Sanborn: It will be received subject to the objection.

(Complainant excepts.)

Evidence closed.

On December 21, 1938, the Court rendered the following

OPINION OF THE COURT

The record shows that the plaintiff is a foreign corporation organized under the laws of the State of New York, duly licensed, under the general statutes regulating such matter, to do business in the State of Iowa, and that such license to do business in the State of Iowa was granted a considerable period of time prior to the enactment of what is commonly known as the Use Tax Act by the legislature of the State of Iowa.

That following the licensing of the plaintiff to do business in the State of Iowa, and up to the commencement of this action, the plaintiff has made large investments in the State of Iowa in connection with the establishment and operation of some twelve retail stores. That the plaintiff has complied with the statutes of the state relative to the assessment of its property located within the state and the payment of taxes thereon, the collection and accounting for the so-called sales tax under the laws of the State of Iowa, on merchandise sold by it in its various stores in Iowa, and the so-called use tax, save and except in the particular as hereinafter mentioned. That the plaintiff operates a very extensive business in the various states of the United States, and in its business organization or setup, it maintains at certain designated localities units of its business which are confined exclusively to what is known [fol. 92] as the mail order business. That it has one such unit located in the City of Chicago, Illinois, one in Kansas City, Missouri, and one in Minneapolis, Minnesota, together with certain other units of like kind located elsewhere in the United States but which are not involved in this case before the court.

That periodically during the year plaintiff causes to be printed and issued what may be termed a general catalogue, which it disseminates to prospective purchasers or customers throughout the territory served by these mail order units of its business, and that such catalogues or publications are circulated throughout the State of Iowa. That customers of the plaintiff in ordering from such catalogues use a form supplied by the plaintiff in which the purchaser designates the specific property which the customer is purchasing, by proper reference to the designation of such article in the catalogue; the purchaser encloses with such order the amount to cover the purchase price, together with the cost of transportation from the mail order unit to which the order is addressed, to the point designated in Iowa by the customer. By specific terms embraced in the order blank, the plaintiff reserves the right of acceptance of the order at the point of reception, that is, either in Chicago, Kansas City, or Minneapolis, according to the unit to which the customer may mail his order, and the delivery of the goods to the purchaser is designated to be at and of the point of the location of the mail order unit so receiving said order from said

customer. That is, if the order is received at Chicago, Illinois, the point of delivery to the customer is specifically provided to be in Chicago, Illinois, and likewise with respect to the other units at Kansas City and Minneapolis, if the order is transmitted from the customer to such unit through the mail or otherwise.

[fol. 93] On orders of this character so received at these mail order units in these several locations, the plaintiff, although demand has been made upon it by the defendants in this action who compose the Iowa State Board of Assessment and Review and who are designated by the so-called use tax act as the body having the enforcement of said use tax law under its authority and control, has refused to collect from the mail order purchaser the said so-called use tax upon the items covered in any of the purchases so made in the manner as indicated herein.

That prior to the commencement of this action, and on or about the 30th day of March, 1938, the defendants caused to be served upon the plaintiff a notice and order advising the plaintiff that unless it complied with the demands of the defendants to collect upon such mail order items the use tax, and remit the same to the State of Iowa through said Board of Assessment and Review, that the said Board would proceed with the necessary steps under the statutes of Iowa to cause a revocation of the right of the plaintiff to transact business in the State of Iowa and to oust from the State of Iowa the said retail establishments of the plaintiff so theretofore established under the general authority granted to it to transact business in the State of Iowa prior to the adoption of the said use tax law, and that following the serving of said notice and order upon the plaintiff this action was commenced to restrain the defendants from carrying out their threatened action looking toward the cancellation of the right of the plaintiff to transact business in the State of Iowa through the medium of the said retail stores, and to oust them from the transaction of business within the state.

By appropriate allegations in plaintiff's petition, the contemplated action of the defendants with respect to the cancellation of the right of the plaintiff to transact business [fol. 94] in Iowa is attacked on numerous constitutional grounds involving alleged violation of constitutional provisions of the Constitution of the United States and also constitutional provisions of the Constitution of the State

of Iowa, which it is claimed protects the plaintiff in the situation, and which would be violated if the threatened action of the defendants was carried out to its proposed culmination.

For the purposes of a disposal and a decision of the rights of the parties in this case, the court feels that only certain of these various questions so raised by the plaintiff are necessary to be determined for a solution in this case, and the court will proceed in the subsequent portions of this opinion to pass upon and decide the rights of the parties in this case, bottomed upon the questions touched upon in this opinion, and those only, as, in the judgment of the court, the final conclusion as arrived at in this opinion disposes of the rights of the parties and is a complete adjudication of the merits of this case.

The plaintiff contends that under the fact situation as it is disclosed by the record in this case, the so-called use tax act, interpreted and applied as is attempted to be done by the defendants in connection with the plaintiff's business, violates Section 8 of Article I of the United States Constitution, the same being what is commonly known and understood to be the interstate commerce clause of the Constitution of the United States, and in this connection the plaintiff points out that under the use tax act it is provided as follows:

Every retailer maintaining a place of business in this state and making sales of tangible personal property for use in this state, not exempted under the provisions of section three hereof nor collectible under the provisions [fol. 95] of section six hereof, shall at the time of making such sales, whether within or without the state, collect the tax imposed by this act from the purchaser, and give to the purchaser a receipt therefor in the manner and form prescribed by the board, if the board shall, by regulation, require such receipt. Each such retailer shall list with the board the name and address of all his agents operating in this state, and the location of any and all his distribution or sales houses or offices or other places of business in this state.

And it is claimed by the plaintiff that this provision of the law which attempts to force the plaintiff to collect the use tax on these mail order items is an invasion of the powers

of Congress under Section 8, Article I of the Constitution of the United States, for that, the effect of the act is to regulate interstate commerce between the states of Illinois, Missouri and Minnesota, and the State of Iowa, as the case may be in the particular facts surrounding the particular mail order item involved, and that the effect of it is to place an undue burden upon the plaintiff in respect to an interstate commerce item, which the State of Iowa is denied the right to legislate in respect to by said Section 8 of Article I of the Constitution of the United States, all power in respect thereto being reserved to the Congress of the United States.

In the oral argument in the submission of this case to this court, the attorney for the State of Iowa substantially admitted that the contentions of the plaintiff would be true if the so-called use tax act was to be literally construed in strict accord with the language of the act as herein quoted, but claimed that it was incumbent upon this court to construe the said use tax act so as to harmonize the same [fol. 96] with the Constitution of the United States in the particular complained of, if the act was susceptible of such construction, and that it was so susceptible to such construction, by construing the act so as not to require the plaintiff to collect the use tax at the time of making such sales in Illinois or Missouri or Minnesota, as the case may be, but contended that it became the duty of the plaintiff-seller to follow the items sold into the State of Iowa and collect the use tax when the interstate commerce feature had ceased to exist by reason of the article coming to rest within the State of Iowa, and that so construed the act would not be violative of the commerce clause of the Federal Constitution.

The answer to the contentions of the State is,

First: That such interpretation is contrary to the express language of the act, for that it is provided that the seller

shall at the time of making such sales, whether within or without the state, collect the tax imposed by this act from the purchaser,

and nowhere in the act is there any other provision for the manner or time of collection, which applies to the plaintiff under the facts in this case. The State contends that the word "shall" should be construed as "may", for that in

numerous decisions of our Supreme Court in construing statutes the word "shall" has been construed "may". But, wherever that has occurred, the use of the word "may" in place of the word "shall" does not do violence to the express language of the act, as is apparently true in the situation as it confronts the court in connection with the act under consideration. In other words, if we are to use the [fol. 97] interpretation as suggested by counsel for the State, we would have this law read that the seller

may at the time of making such sales, whether within or without the state, collect the tax imposed by this act from the purchaser, etc.,

and in order to give proper effect to the word "may" as used in the act, under such an interpretation, the court would have to give force and effect to the word "may" as if it read "shall", for otherwise there would be no duty created by the statute upon the seller to collect the tax. If the word "may" is to be used literally, it is merely permissive and not mandatory.

Second: A construction and application similar to what is contended for by the State, would result in not only leaving the act open to an attack as violative of Section 8 of Article I of the Constitution of the United States, but would leave it susceptible to the attack because of its violation of Section 1 of the 14th Amendment to the Constitution of the United States, as asserted by plaintiff herein. The effect of the construction as contended for by the State would result in a denial to the plaintiff of the right to contract, for instance, in the State of Illinois, with a prospective purchaser from Iowa, in such a way as to bring about a situation whereby the contract would be exclusively an Illinois contract, as actually exists in connection with the transactions as the record shows with respect to each of these mail order items, and to say to the plaintiff,—

"If you sell to some purchaser living in Iowa, although the transaction may have its inception and its consummation in the State of Illinois, still you are required by the laws of Iowa to retain dominion and jurisdiction over the [fol. 98] item involved in the transaction and to follow the same into the State of Iowa in an interstate shipment where the seller is an involuntary shipper, and to collect the tax

when the interstate feature has ceased to exist and the article has come to rest in the State of Iowa."

A denial of the right to so contract clearly infringes upon the provisions of Section 1 of the 14th Amendment to the Constitution of the United States, for it is an abridgement of the right that the plaintiff is entitled to exercise in the foreign jurisdiction, so far as the State of Iowa is concerned, of entering into contractual relations whereby the plaintiff sells and a resident of this state buys, with the specific conditions in the contract that the delivery shall be at the point of purchase in the foreign jurisdiction and not at a point in the State of Iowa. To deny a citizen of another state the right to so contract with a citizen of this state, certainly is to abridge the privileges and immunities of citizens of the United States and to deny the plaintiff the protection of the said 14th Amendment in that particular. It also would have the effect of denying the equal protection of the laws, as prohibited by the said Section 1 of the 14th Amendment of the Constitution of the United States, for the record shows that there are competitors of the plaintiff in these various localities where plaintiff has these mail order units, who have no places of business in Iowa and who are not affected by the use tax law.

As heretofore suggested, such a construction would also violate the interstate commerce clause of the Constitution of the United States, being Section 8 of Article I, in that it would deny to the plaintiff the right of delivery of the purchase in the foreign state as contemplated by the contract entered into between the seller and the purchaser, as shown by the record in this case, and make it obligatory [fol. 99] upon the plaintiff to retain dominion over the article of sale until it had reached its destination in Iowa, and thereby compel the plaintiff to become an involuntary shipper in an interstate shipment. If anything of that character is possible under the law, it must be through an act of congress and not through the act of a legislature of a given state, because the effect of it is to make the plaintiff engage in interstate commerce with respect to that shipment against the will and judgment of the plaintiff and against its desires, simply because it indulges in the privilege and right which it has as a citizen of the United States to engage in a contractual relation with a citizen of the

State of Iowa, outside the State of Iowa and in a foreign jurisdiction, and although such contract may be in strict conformity to the requirements of the statutes of the state where the contract is made and in conformity to the requirements of the Constitution and the acts of congress with respect to the United States. And, in addition to what has already been suggested, no such result can be accomplished except by and through an extraterritorial effect to the local statutes of Iowa, and to sustain which there have been no authorities submitted to this court by counsel for the State.

The State does contend that this case comes within the pronouncements of the United States Supreme Court in cases of Wiloil Corporation v. Pennsylvania, 294 U. S. 169; Henneford, et al., v. Silas Mason Company, Inc., et al., 300 U. S. 577; State of Minnesota v. George Blasius, 290 U. S. 1; Monamotor Oil Company v. Johnson, 292 U. S. 86, and Felt & Tarrant Mfg. Co. v. Corbett, reported in 23 Federal Supplement on page 186, but the court is of the opinion that an analysis of these cases will clearly establish that they are readily distinguishable from the situation that exists in the case at bar. In all of these cases the language [fol. 100] of the opinion clearly shows that either the owner of the property involved and upon which the tax was sought to be collected, brought the property into the state and the state authorities were proceeding against such owner to collect the tax, or where the state authorities were proceeding to subject the seller to the payment of the tax, such seller was the shipper of the articles into the state and the articles had come to rest in the various states, and the tax was held to apply after the articles had ceased to be in interstate commerce and had come to rest in the state involved and was still within the dominion and control of the seller at the time of the attaching of the tax feature.

The State of Minnesota v. Blasius, supra, is a case where the property was in the possession and control of the owner in the State of Minnesota and the owner contended that it was still in process of interstate commerce, for that it had only come to rest in Minnesota temporarily, the property being cattle, but in the case, Mr. Chief Justice Hughes writing the opinion, points out,

that Blasius did not buy the cattle for the purpose of export or shipment to another State; and that after their purchase

by him, and until he resold, the cattle were "at absolute and complete rest in the yards at South St. Paul" and "were a part of the general mass of cattle in the State and locally owned."

The quoted language here was quoted by Mr. Justice Hughes from the opinion of the trial court and was adopted by the Supreme Court as the fact.

Henneford v. Silas Mason Company, supra, was another case where the property was in the possession and control of the owner in the State of Washington, and the owner, [fol. 101] the plaintiff in the action, being a contractor on the Grand Coulee Dam on the Columbia River, shipped the articles of machinery into the state and they came to rest in the state and had been used for months in the work of the contractor, and again the court held that because they had come to rest in the state, under the control and possession and dominion of the owner, they were amenable to the tax in controversy.

In the Felt & Tarrant Mfg. Co. v. Corbett case, supra, it appears from the language of the opinion as follows:

The plaintiff is an Illinois corporation and it sold comptometers in the State of California by and through the medium of two local agents residing in California; that these agents in selling the articles did so by and through the medium of written contracts which provided that it did not become a contract with the plaintiff until it had been accepted by them at their place of business in Illinois, but the contract contained this provision,

All orders taken must be submitted to and approved by plaintiff, all sales *and deliveries must be made by,* and all bills for such orders as are accepted must be rendered by, *the plaintiff.*

It further appears from the language of the opinion, as follows:

All machines sold for delivery in California are shipped from one of plaintiff's distributing points outside of the state. Sometimes machines are forwarded directly to the purchasers, while in other instances, *in order to secure reduced freight charges,* large groups of machines are shipped to the general agent who makes delivery to the respective purchasers.

[fol. 102] When we consider that under the terms of the written contract all deliveries were required to be made by the plaintiff, and then the further observation of the court is taken into consideration, that in order to reduce freight charges the plaintiff-seller shipped large quantities of machines at one time, it is clearly apparent that in this cited case the shipment of the machines into the State of California was by the plaintiff, and they continued their dominion and control over the machines until the delivery in California, at which time, under the decisions of the Supreme Court of the United States, the articles had ceased to be in interstate commerce and had come to rest in the State of California.

Defendants in the instant case lay great stress upon the decision of the United States Supreme Court in the case of the Monamotor Oil Company v. Johnson, supra. That case had its origin in the State of Iowa, and it is claimed by the defendants in the instant case to be decisive of the question that we have under consideration here.

With this conclusion this court cannot agree. It appears from the opinion in the cited case that the appellant was an Arizona corporation engaged in the business of buying, manufacturing, blending and selling gasoline and kindred products, including the importation into Iowa of gasoline by tank cars, and that in some instances the plaintiff shipped direct to dealers in Iowa, customers of the appellant, and it was claimed by the plaintiff that because of these direct shipments, the burden on interstate commerce was obvious. In disposing of the case the Supreme Court of the United States, Mr. Justice Roberts delivering the opinion, says, in connection with this contention of the plaintiff:

The statute obviously was not intended to reach transactions in interstate commerce, but to tax the use of motor [fol. 103] fuel after it had come to rest in Iowa, *and the requirement that the appellant as the shipper into Iowa shall,* as agent of the state, report and pay the tax on the gasoline thus coming into the state for use by others on whom the tax falls imposes no unconstitutional burden either upon interstate commerce or upon the appellant.

Now, when we take the language as quoted from this cited case and consider it in the light of the law defining who was a distributor of motor fuel oil within the meaning of the

statute, it is plain that this decision in the cited case was predicated upon the fact that the Monamotor Oil Company actually was the shipper of the oil, under all circumstances, into Iowa, and continued to have dominion and control over it until a delivery to the dealer in Iowa, because the law defining who is a distributor is as follows:

any person who brings into the state or who produces, refines, manufactures or compounds within the state any motor vehicle fuel to be used within the state or sold or otherwise disposed of by him within the state for use in the state.

So that in order to be a distributor one must either bring the oil into the state or produce it or refine it or manufacture it or compound it, within the state, for use within the state. So that it is apparent that in the consideration and determination of this cited case, the United States Supreme Court understood, and the records show, that on these shipments direct to dealers in Iowa, the Monamotor Oil Company was the shipper and continued in dominion and control of the products so shipped until they came to rest in Iowa and were delivered to the dealers. Under such cir- [fol. 104] cumstances, of course, under the decisions of the United States Supreme Court, as herein cited, the oil having come to rest before delivery to the dealer, the distributor was liable in the first instance for the tax.

This distinction which is pointed out in connection with all of these cases upon which the State relies, is clearly set forth in the opinion of the Supreme Court of the United States in the case of Wiloil Corporation v. Pennsylvania, supra. The opinion in that case was written by Mr. Justice Butler, and in order to have the fact situation clearly before us it is advisable to set out the statement of the facts as found by the court:

Appellant, a Pennsylvania corporation having its principal place of business in Pittsburgh, sells liquid fuels at wholesale and is a distributor as defined by the act. The tax in controversy was laid at three cents per gallon upon the contents of 13 tank cars sold and delivered by it. All were ordered through its agent in Philadelphia for delivery to purchasers at that city or at Essington, Pennsylvania. The orders specified a price per gallon "f. o. b. Wilmington, Del., plus 3c tax," and were subject to, and received, ap-

pellant's approval at its office in Pittsburgh. The purchasers were not licensed or taxable as distributors. All fuels delivered under these contracts were obtained from Crane Hook Company of Wilmington, Delaware, and on the order of appellant were shipped by rail from there to the purchasers in Philadelphia or Essington. Each car moved on a bill of lading in which the appellant was consignor and the purchaser was consignee; the place of shipment indicated was Wilmington and the place of destination was consignee's private siding in Philadelphia or Essington. [fol. 105] Appellant prepared and sent to the buyer an invoice covering each shipment showing the price as stated in the order.

The inference that might be drawn from the f. o. b. order, the billing and straight bill of lading *that the parties intended delivery to purchaser at place of shipment is negatived by other circumstances.* The contracts were executory and related to unascertained goods. It does not appear that when they were made appellant had any fuels of the kinds covered or that those to be delivered were then in existence. There was no selection of goods by purchasers. Appellant was not required by the contracts to obtain the fuels at Wilmington but was free to effect performance by shipping from any place within or without Pennsylvania. It is the practice in appellant's business to sell f. o. b. at a specified place in order to fix the price and such billing may be merely price fixing and not an indication of the source or place of shipment. *The reference to the tax in the orders and invoices would have been unnecessary if delivery were not to be made in Pennsylvania for if made at Wilmington, the transactions would not have been within the provision of the taxing act.*

The great particularity with which Mr. Justice Butler points out the retaining of the control and dominion over the shipment by the Wiloil Corporation in this cited case, will be noted, and his plainly pointing out that the tax reference in the orders would have been unnecessary.

if delivery were not to be made in Pennsylvania for if made at Wilmington, the transactions would not have been within the provision of the taxing act,

[fol. 106] clearly shows that this matter of dominion and control over shipments of this character is the paramount

and outstanding consideration in determining whether or not the seller of an article is to be held liable in the first instance for a tax of the character we have under consideration in the instant case, and all of the cases upon which counsel for the State of Iowa in the case at bar relies as sustaining his contention of the right of the State to insist upon the collection of the tax in this case under consideration, by the seller, are clearly distinguishable from the fact setup that we have to deal with in the instant case.

As indicated by the reasoning of the court in the instant case and in this opinion, this court is of the opinion, and so holds, that the attempt by the State of Iowa, through the medium of the defendants, the Board of Assessment and Review of the state, to interpret and apply the statute so as to make it obligatory upon the plaintiff to collect the use tax on these items of exclusive mail order transactions wherein the fact situation is as already outlined herein, is clearly violative of the constitutional rights of the plaintiff in regard to invading the rights of the plaintiff under Section 1 of the 14th Amendment to the Constitution of the United States, and in regard to Section 8 of Article I, of said Constitution.

The defendants further contend that even though the court finds as it has already found and expressed herein, that the statute as interpreted and applied by the defendants is violative of the constitutional rights of the plaintiff under the Federal Constitution, that still it is within the legal right of the State to predicate an order cancelling the permit of the plaintiff to transact business in the State of Iowa, upon its refusal to comply with the notice and order as served upon it by the defendants to proceed to collect and report to the defendants for the use tax upon these items [fol. 107] of mail order business, and in support of their claims in this regard this court is cited to several cases, one of the outstanding ones being Security Mutual Life Insurance Company v. Prewitt, 202 U. S. 246. Counsel for the State in oral argument laid emphasis upon this case and several others of a like tenor, but possibly in none of the cases cited is the language quite as positive and extreme as is the language of Justice Peckham in the cited case referred to, and if the cited case was still the law there would be much of merit in the contention of the State on this proposition, but fortunately the United States Supreme Court in the case of Terral v. Burke Construction Co., 257 U. S. 529,

has clarified a doubtful situation which had existed over a period of years in connection with this question now under consideration.

It appears from a reading of the opinion that the Burke Construction Company was a corporation organized under the laws of the State of Missouri; that it had been licensed to do business in the State of Arkansas; that it was organized for the purpose of doing construction work and was actually so engaged in Arkansas; that the right to do business in the state was a valuable privilege, and the revocation of the license would greatly injure it. That it had brought an original suit in the federal court of Arkansas and had removed a suit brought against it to the same federal court; that the Secretary of State was about to revoke the license because of said suit and such removal, acting under the requirement of Section 1 of the Act of the Legislature of Arkansas of May 13, 1907, reading as follows:

If any company shall, without the consent of the other party to any suit or proceeding brought by or against it in any court of this State, remove said suit or proceeding to any Federal court, or shall institute any suit or proceeding [fol. 108] against any citizen of this State in any Federal court, it shall be the duty of the Secretary of State to forthwith revoke all authority to such company and its agents to do business in this State, and to publish such revocation in some newspaper of general circulation published in this State; and if such corporation shall thereafter continue to do business in this State, it shall be subject to the penalty of this Act for each day it shall continue to do business in this State after such revocation.

The penalty was fixed at not less than $1,000.00 a day. The plaintiff construction company averred that the Act was in contravention of Section 2, Article III, being the judiciary article of the Federal Constitution, and of Section 1 of the 14th Amendment. The defendant filed an answer in the case containing some denials, but there was no denial that the plaintiff was a foreign corporation or that it had been duly granted a license to do business in the State of Arkansas, or that its right to do such business in Arkansas was a valuable right, or that it had commenced an action in federal court and removed another one, or that the defendant intended to cancel the plaintiff's license because of the removal of the case to the federal court and the

commencement of the other one therein. Such matters not being denied were accepted as admitted, and then Chief Justice Taft says:

The sole question presented on the record is whether a state law is unconstitutional which revokes a license to a foreign corporation to do business within the State because, while doing only a domestic business in the State, it resorts to the federal courts sitting in the State.
[fol. 109] The cases in this court in which the conflict between the power of a State to exclude a foreign corporation from doing business within its borders, and the federal constitutional right of such foreign corporation to resort to the federal courts has been considered, can not be reconciled. They began with—

And then Chief Justice Taft cites a number of cases involving the question, including Barron v. Burnside, 121 U. S. 186, which went up to the Supreme Court of the United States from the State of Iowa, and in which the Supreme Court had held a statute of the same character as was under consideration in the Terral case from Arkansas, to be unconstitutional, and also this case already referred to, Security Mutual Life Insurance Co. v. Prewitt, 202 U. S. 246, and then he says:

The principle established by the more recent decisions of this court is that a State may not, in imposing conditions upon the privilege of a foreign corporation's doing business in the State, exact from it a waiver of the exercise of its constitutional right to resort to the federal courts, or thereafter withdraw the privilege of doing business because of its exercise of such right, whether waived in advance or not. The principle does not depend for its application on the character of the busines the corporation does, whether state or interstate, although that has been suggested as a distinction in some cases. It rests on the ground that the Federal Constitution confers upon citizens of one State the right to resort to federal courts in another, that state action, whether legislative or executive, necessarily calculated to curtail the free exercise of the right thus secured is void [fol. 110] because the sovereign power of a State in excluding foreign corporations, as in the exercise of all others of its sovereign powers, is subject to the limitations of the

supreme fundamental law. It follows that the cases of Doyle v. Continental Insurance Co., 94 U. S. 535, and Security Mutual Life Insurance Co. v. Prewitt, 202 U. S. 246, *must be considered as overruled* and that the views of the minority judges in those cases have become the law of this court. The appellant in proposing to comply with the statute in question and revoke the license was about to violate the constitutional right of the appellee. In enjoining him the District Court was right, and its decree is Affirmed.

This pronouncement of the Supreme Court through the opinion of the late Mr. Chief Justice Taft, is still the law of this country so far as this court has been able to ascertain from an examination of the authorities, and it has been applied on a number of occasions since its pronouncement, one such application being by the late Mr. Justice Holmes in the case of Fidelity & Deposit Co. v. Tafoya, 270 U. S. 426, wherein Mr. Justice Holmes uses the following language:

Coming then to the merits, we assume in favor of the defendants that the State has the power and constitutional right arbitrarily to exclude the plaintiff without other reason than that such is its will. But it has been held a great many times that the most absolute seeming rights are qualified, and in some circumstances become wrong. One of the most frequently recurring instances is when the so-called right is used as part of a scheme to accomplish a forbidden result.

[fol. 111] And further on in the opinion Mr. Justice Holmes refers specifically to the Terral v. Burke Construction Co. case, supra, citing it with approval. How apt in its application to the case at bar is this quotation from this opinion in the cited case under consideration:

One of the most frequently recurring instances is when the so-called right is used as part of a scheme to accomplish a forbidden result.

In the case at bar the State of Iowa, through the instrumentality of the defendants, is seeking to oust the plaintiff company from the right to do business in the State of Iowa because it refuses to perform an act demanded of it which is violative of its constitutional rights under the provisions

of the Federal Constitution as already herein discussed, and saying to the plaintiff,—"Unless you do comply with our illegal demand you will have to get out of the State of Iowa with your retail stores." If that can be accomplished through the medium of legislative enactment of a state and thereby nullify the constitutional inhibitions of the Federal Constitution, there is nothing left of the Federal Constitution which would make it rise to the dignity of the fundamental law of this country, which it is and which it has been recognized to be for all the years since it has been adopted.

So that the court is satisfied that there is no merit in the contention of the State that it can predicate an order of removal against the plaintiff company and compel it to remove from the State of Iowa with its retail stores because of the failure of the plaintiff to acquiesce in the demands of the state through the medium of the defendant Board, in regard to the collection of and accounting to the State for [fol. 112] the use tax on these items involved in the exclusive mail order business of the plaintiff, as described in this opinion.

What has been said in regard to the inability of the State to predicate an order of removal against the plaintiff because of the invalid demand in regard to the tax on these mail order items applies with equal force to the suggestion of the State that because the State of Iowa has reserved by Section 8376 of the Code of 1935, the right and power to legislate as to corporations and to enact laws different from those obtaining at the time of the organization of the corporation, that it has the right to enact mandatory laws of the character involved in this action and to expel a foreign corporation who refuses to comply. The particular section refered to is as follows:

The articles of incorporation, by-laws, rules and regulations of corporations hereafter organized under the provisions of either title 19, 20, 21, or 22 or whose organization may be adopted or amended thereunder, shall at all times be subject to legislative control, and may be at any time altered, abridged or set aside by law, and every franchise obtained, used, or enjoyed by such corporation may be regulated, withheld, or be subject to conditions imposed upon the enjoyment thereof, whenever the general asembly shall deem necessary for the public good.

It must be apparent that this reserved power can only be exercised by and through the medium of legal legislative enactment. Unless the act has been legally enacted and is legal in its effect on the thing legislated with reference to, it is not a law, and never rises to the dignity of a law, and therefore can be of no effect. And it would be astounding [fol. 113] if the pronouncement of the legislature as to what was for the public good would be sustained, notwithstanding the fact that the particular act was found to be violative of the inhibitions of the Constitution of the United States. That is clearly contradictory in its terms. An act that would violate the Constitution of the United States necessarily could never be for the public good.

The same is true of the suggestion by counsel for the State, that in the issuance of the permit to the plaintiff company, there was incorporated the reserved power to proceed with subsequent legislative control similar to what is covered by the section of the Code above quoted. As has been seen in Terral v. Burke Construction Co., supra, even if the plaintiff company in this case before the court, had signed an express waiver and entered the state with that situation and proceeded to transact business, the waiver is held a nullity, and it may resort to the federal courts or to any court in this country for protection against the invasion of its constitutional rights, and it is without liability to be removed from the state on peremptory order because of its invoking the aid of the court to so protect it.

The court has sufficiently outlined herein by its reasoning, that in this case the plaintiff is entitled to the issuance of an injunction permanently enjoining the defendants from doing or performing any or each of the things specified in plaintiff's prayer, insofar as any such act or thing may be predicated upon the failure of the plaintiff to comply with the demands of the defendant Board in connection with the collection of the use tax on items of merchandise sold by and through the medium of the exclusive mail order business of the plaintiff, and in the manner as herein outlined, as the same may occur in any of its exclusive mail order depots or houses loacted outside of the State of Iowa.

[fol. 114] Counsel for plaintiff is directed to prepare a decree in conformity to this opinion, submit the draft of the same to counsel for the State for approval as to form, noting an exception to the state or the defendants on all adverse rulings, and when so approved as to form, submit the same

to this court for signing and entering of record in the case.
Signed John J. Halloran, Judge.

(Copy)

JUDGMENT AND DECREE

On the 12th day of December, 1938, the same being one of the judicial days of the November, 1938, term of this court, the above entitled cause came on in its order for hearing and trial on the merits before the undersigned as presiding judge of the Equity Division of the above entitled court. The plaintiff appeared by Gamble, Read, Howland & Rosenfield, its attorneys, and the defendants appeared by John H. Mitchell, Attorney-General of the State of Iowa, Charles Bookin, Special Attorney-General and Charles W. Wilson, Assistant Attorney General.

Thereupon a trial was had and evidence offered and introduced by the parties. At the conclusion of the trial the court heard counsel in argument: and the court having considered the facts and the law and being fully and well advised in the premises, rendered and filed in this cause on, to-wit, the 21st day of December, 1938, its "Opinion", finding that on the facts and the applicable law and for the reasons as stated in said opinion the merits of this cause are with the plaintiff and that the plaintiff is entitled to a permanent injunction against the defendants in accordance with the prayer of plaintiff's petition.

[fol. 115] Now, Therefore, in conformity with said Opinion, it is Ordered, Adjudged and Decreed:

(1) That the temporary injunction heretofore granted to the plaintiff in this cause should be made permanent.

(2) That the defendants, and each of them, are permanently enjoined and restrained from doing any and each of the following acts, to-wit:

(a) Making or entering any finding or order that plaintiff has failed to comply with the purported requirements of the order of said State Board of Assessment and Review dated March 30, 1938;

(b) Making any finding that plaintiff has failed to comply with the provisions of the Iowa Use Tax Law;

(c) Revoking or canceling any sales permit issued to plaintiff covering the operation of its retail stores within the State of Iowa;

(d) Certifying or transmitting to the Secretary of State of the State of Iowa any order or finding with respect to plaintiff's alleged failure to comply with the laws of Iowa with respect to the collection of the so-called "Use Tax," or making any request upon the Secretary of State for the revocation of plaintiff's license to do business within said State as a non-resident corporation, and

(e) From taking any action for the enforcement of the so-called "order" of the Iowa State Board of Assessment and Review dated March 30, 1938, or disturbing the property or position of plaintiff with respect to its business in the State of Iowa as the result of any failure or refusal on the part of plaintiff to comply with the provisions of the so-called "Iowa Use Tax Act," as construed and applied by the defendants;

[fol. 116] insofar as such acts may be predicated upon the failure of plaintiff heretofore or hereafter to comply with the demands of the defendants for the collection by the plaintiff and/or the payment or remittance by the plaintiff of the "Use Tax" on items of merchandise sold by and through the medium of the exclusive mail order business of the plaintiff, i.e., sales identified in the record in this cause as "Type 3" Mail Order Sales.

(3) Judgment is hereby rendered in favor of the plaintiff and against the defendants and each of them for the costs of this action as taxed by the Clerk.

(4) The injunction bond filed by plaintiff in connection with the issuance of the temporary injunction is released and the surety exonerated.

The defendants duly except to all adverse rulings and to this decree.

Dated this 29th day of December, 1938.

(Sgd.) John J. Halloran, Judge.

Approved as to Form:

(Sgd.) John H. Mitchell, Charles Wilson, Charles Bookin, Attorneys for Defendants.

Thereafter the defendants perfected an appeal from the foregoing judgment and decree by serving on the plaintiff's attorneys on the 28th day of March, 1939, and by filing in the office of the Clerk of the District Court of Polk County, Iowa, on the 29th day of March, 1939, with acceptance of service endorsed thereon a

[fol. 117] NOTICE OF APPEAL

To Sears, Roebuck and Co., plaintiff, and to Gamble, Read, Howland & Rosenfield, their Attorneys:

You and each of you are hereby notified that the defendants herein have appealed to the Supreme Court of Iowa, from the final judgment in this cause and from the final order or decree herein and from each and every ruling adverse to the defendants during the progress and hearing of the said case and that said appeal will come on for hearing at the May, 1939, term of the Supreme Court of Iowa or as soon thereafter as the same can be heard in its regular order in said court.

Dated at Des Moines, Iowa, this 27th day of March, 1939.

Fred D. Everett, Attorney General of Iowa, John E. Mulroney, Assistant Attorney General of Iowa, Attorneys for Defendants.

CERTIFICATE

On the 13th day of December, A. D., 1938, there was filed in the office of the Clerk of the District Court of Polk County, Iowa, the official shorthand notes taken by the reporter in said case, containing all of the evidence offered, introduced, heard, read or received in the trial of said cause, and all objections thereto, and all rulings of the court thereon, and exceptions taken to said rulings, together with exhibits offered and introduced on the trial and made a part of the record therein, said shorthand notes, together with the exhibits and documentary evidence, being certified to [fol. 118] by Honorable John J. Halloran, Judge, and W. Scott Reiniger, official shorthand reporter.

On the 19th day of July, A. D., 1939, there was also filed in the office of the Clerk of the District Court of Polk County, Iowa, a transcript and translation of said shorthand notes, certified to by the shorthand reporter transcribing said notes as an accurate transcription of the short-

hand notes of the evidence taken in the trial of said cause by the shorthand reporter.

CERTIFICATE OF ATTORNEYS

We hereby certify that the foregoig Abstract is a full and complete abstract of the record in the foregoing cause, including abstract of all pleadings filed in said cause, together with the ruling of said court with the objections and exceptions thereto in so far as the same are material to this appeal.

Fred D. Everett, Attorney General, John E. Mulroney, Assistant Attorney General, Attorneys for Appellants.

NOTICE OF ORAL ARGUMENT

Notice is hereby given that upon the submission of this cause, the appellants will appear and argue the same orally.

Fred D. Everett, Attorney General, John E. Mulroney, Assistant Attorney General, Attorneys for Appellants.

[fols. 119-121] CERTIFICATE OF COST

We hereby certify that the cost of printing the foregoing Appellants' Abstract of Record is in the sum of $103.55.

Fred D. Everett, Attorney General, John E. Mulroney, Assistant Attorney General, Attorneys for Appellants.

[fol. 122] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 123] IN SUPREME COURT OF IOWA, SEPTEMBER TERM, 1939

9-44997. Equity

SEARS, ROEBUCK AND CO., Appellee,

vs.

LOUIS E. RODDEWIG, as Chairman of the Iowa State Board of Assessment and Review, and Individually; D. L. Murrow and C. Frank Green, as Members of the Iowa State Board of Assessment and Review, and Individually, Appellants

Appeal from District Court of Polk County, Iowa

Honorable John J. Halloran, Judge

Appellee's Amendment to Abstract of the Record—Filed October 9, 1939

[fol. 124] Appellee amends Appellants' Abstract of the Record as follows:

Amend the testimony of Harry A. Welsher, by inserting following the period after the word "Iowa" in line 6 on page 81 of the Abstract, the following: "It has been doing so for many years".

Amend the testimony of Theodore V. Houser, as follows:

By inserting after the word "mailed" in line 11, page 82 of the Abstract, the following: "to residents of the State of Iowa".

By inserting following the period after the word "orders" in line 14, page 82 of the Abstract, the following: "Sending these catalogues and bulletins is our sole means of securing business".

By inserting following the period after the word "carried" in line 17 of page 82 of the Abstract, the following: "It differs in the sense that much of the merchandise in the retail stores differs in character from that carried in the mail order plants".

By adding following the word "stores" in line 21, Abstract page 82, the following: "from which [list] each in-

dividual store makes its selection of the items it will carry in that store".

Add following the word "orders" in line 3, Abstract page 83, the following: "which are received in the mail order houses throughout the United States from residents of the State of Iowa".

Add following the word "Assuming", in line 25, Abstract [fol. 125] page 83, the following: "that neither the Chicago Mail Order House nor National Bellas Hess nor Jim Brown Fence Company has any place of business in the State of Iowa, and".

Add following the word "we" in line 1, Abstract page 84, the following: "undertake to".

Add following the word "we" in line 3, Abstract page 84, the words, "try to".

Add following the period after the word "business" in line 22, Abstract page 84, the following: "The amounts involved are not large enough to warrant the posting of those and the keeping of a record of the customers, so that we have no record by customer's name of such balance due us. Our experience is that the smaller the amount, the smaller the percentage that customers remit later."

Add to line 30, Abstract page 84, the following: "And in addition our customers, of course, would be subjected to an extra expense in making such remittance."

Add, following line 30, Abstract page 84, the following: "My last answers were predicated upon the assumption that we would put a similar notice on our catalogues which I have described as that which we are using in Illinois, requesting the customer to remit with his order the amount of the tax. If we did not put that notice on our catalogue, our collections of the use tax on shipments to residents of the State of Iowa would not exceed $35,000.00, leaving the balance uncollectible and our cost involved would be approximately $18,000.00, on the assumption that such use tax would amount to approximately $100,000.00 a year. I don't see how the use tax could be collected at all from Iowa residents if Sears, Roebuck and Co. neither request payment of the amount at the time of making the sale or if the [fol. 126] goods were shipped and delivered to the Iowa customer before any effort was made to make the collection."

Cross-examination of Theodore V. Houser:

Add following the period after the word "tax", on line 15, Abstract page 85, the following: "There is no new technique. It is merely the matter of educating hundreds of thousands of people. Just a question of time."

Add to line 26, Abstract page 85, the following: "You are not taking all the factors into account. Spiegels in Chicago and the Chicago Mail Order were also in the question. The two largest companies are Spiegels and Chicago Mail Order who are located there [in Illinois] and who employ the same method that we employ."

Redirect examination of Theodore V. Houser:

Add to line 9, Abstract page 87, the following: "They are in direct competition because we have even cooperated with such companies in a study of the amount of duplication in customers' homes. We know that there is a large percentage of duplication, and that the mail order business, more than any other type of retail business, is based on competitive prices."

Amend the testimony of Charles E. Kallal, by inserting following the period after the word "division", in line 26, Abstract page 87, the following: "It is a part of my duties [fol. 127] to ascertain the amount in money of retail sales annually effected by the retail stores of the Company located in the State of Iowa."

Amend the abstract by striking the word "case", in line 31, page 87, and inserting in lieu thereof the word "cash".

Amend the abstract by striking the words "case" and "run", in line 33, page 87, and inserting in lieu thereof the words "cash" and "rung".

Insert following the period after the word "total" in line 3, Abstract page 88, the following: "Ordinarily there is an amount included in a remittance to cover transportation charges on the goods ordered."

Add following the period after the word "shortage" in line 6, Abstract page 88, the following: "As long as I have known Sears, Roebuck they have employed that practice in an effort to collect deficiencies of that sort. They are not able to make all of those collections. Experience has shown us that approximately of the 'due us's'—those amounts less than twenty-five cents—we receive approximately 36%,

whereas of the larger amounts, approximately 70% to 75% is collected."

Add preceding the period following the word "department", in line 18, Abstract page 88, the following: "in the State of Iowa".

Add after the period following the figures "2,250,000", in line 23, Abstract page 88, the following: "The aggregate of the three was approximately $5,900,000."

Strike the word "case", in line 29, Abstract page 88, and insert in lieu thereof the word "cash".

[fol. 128] CERTIFICATE

We hereby certify that the foregoing Amendment to the Abstract of the Record is true and correct, and that said Amendment is necessary to a full understanding of the facts and the questions presented to the Court for decision. That the Appellants' Abstract of the Record, as amended by Appellee's Amendment is a true, full, and correct abstract.

Gamble, Read, Howland & Rosenfield, Attorneys for Appellee.

NOTICE OF ORAL ARGUMENT

Notice is hereby given that upon the submission of this cause, the appellee will appear and orally argue the same.

Gamble, Read, Howland & Rosenfield, Attorneys for Appellee.

COST CERTIFICATE

We hereby certify that the cost of printing the foregoing Amendment to the Abstract of the Record, and the amount actually paid therefor was the sum of $7.00.

Gamble, Read, Howland & Rosenfield, Attorneys for Appellee.

[fol. 129] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 130] In Supreme Court of Iowa, January Term, 1940
Term, 1940

Equity

Sears, Roebuck and Co., Appellee

vs.

Louis E. Rodenwig, as Chairman of the Iowa State Board of Assessment and Review, and Individually; D. L. Murrow and C. Frank Green, as members of the Iowa State Board of Assessment and Review, and Individually, Appellants

Appeal from District Court of Polk County, Iowa, Honorable John J. Halloran, Judge

Opinion of the Court—Filed May 14, 1940

[fol. 131] Suit in equity to enjoin the defendants, as members of the State Board of Assessment and Review, from undertaking to cancel plaintiff's permit to do business in Iowa for failure to pay a use tax on mail order sales made by plaintiff outside of Iowa. The court granted the injunction. Defendants appeal.—Affirmed.

Miller, J:

The plaintiff's petition asserts that it is a non-resident corporation licensed to do business in the State of Iowa. Pursuant to such license, it has established and is now conducting various retail stores in Iowa which constitutes a substantial investment on its part. It has reported to and paid the State Board of Assessment and Review the amount of the tax due on all sales made in Iowa through the operation of such retail stores. In addition to the business conducted in Iowa, it has for many years and is now conducting a mail order business through mail order stores or establishments, all of which are located outside of Iowa. The orders from customers in Iowa are sent to such stores by mail, are there filled, and the merchandise shipped to the purchasers in Iowa. Plaintiff has not collected nor paid a use tax on such mail order sales made outside of Iowa to customers residing in Iowa. There are numerous firms who maintain no place of business in Iowa who conduct a mail order business with residents of Iowa in competition with plaintiff, who

are not required to and do not collect the use tax on sales made by them. The defendants, acting as the State Board of Assessment and Review, construed the statute as authorizing and empowering them to require plaintiff to collect [fol. 132] the use tax on mail order sales made and consummated outside of Iowa with customers located in Iowa. The Board adopted a resolution, threatening to cancel plaintiff's license as a retailer and its permit to do business in Iowa for failure to collect and pay the use tax on mail order sales made outside of Iowa to residents of Iowa.

Plaintiff asserted that the statute, insofar as it purports to authorize such procedure by the board, is unconstitutional in violation of Sections 8 and 10 of Article I of the United States Constitution, and Section 1 of the 14th Amendment to such Constitution, and is also an attempt on the part of the State of Iowa to make its laws operate extraterritorially. Plaintiff prayed that the board be enjoined from finding that it has failed to comply with the use tax law and from taking any steps to secure the cancellation of its license as a retailer or its permit to do business in Iowa and for general equitable relief.

A hearing was had and the court granted a temporary injunction restraining the defendants from making any finding that plaintiff had failed to comply with the provisions of the use tax law, or taking any steps to secure the revocation of plaintiff's license as a retailer or permit to do business as a non-resident corporation.

The defendants filed an answer admitting all allegations of the petition not specifically denied, modified or qualified. Defendants asserted that the state has the power and authority to adopt the use tax law and make it applicable to plaintiff's mail order business as a condition to its right to continue to do business in Iowa. Various allegations of the petition are denied. The effect of the answer, however, was primarily to put in issue the constitutional questions presented by the allegations of the petition.

[fol. 133] At the trial, it was stipulated that the plaintiff, in the conducting of its business, made sales of tangible personal property to residents or persons within the State of Iowa, by three methods, referred to as types. Type I involves sales made in its retail stores located in Iowa, which sales are subject to the Iowa sales tax. Type II involves special order sales wherein the purchaser orders from one of plaintiff's retail stores in Iowa tangible property not car-

ried in stock by the store, but carried by one of the mail order establishments located outside of Iowa; the order is given to the local store with the purchase price, which includes transportation charges; the store orders the shipment to be made direct to the purchaser from a mail order establishment, where the order is filled charging the local store with the cost price, plus overhead and transportation charges; the purchase price paid to and received by the local store is retained by it and included in the volume of its gross sales. Type III involves mail order sales. A person or resident of Iowa prepares his order, or has it prepared for him, sends it to one of plaintiff's mail order establishments located outside of Iowa, with a remittance of the purchase price, plus transportation charges, specifying the means of transportation; the order is accepted or refused at the mail order establishment; if accepted, the order is filled by direct shipment to the purchaser through the United States mail, or some common carrier specified by the purchaser.

It was stipulated for the purposes of this case that plaintiff is obligated to collect and has collected and paid the tax imposed upon all sales made by it to residents of Iowa classified as Types I and II, but that as to Type III, mail order sales, it failed and refused to collect the use tax imposed by the use tax act.

[fol. 134] There was testimony as to the activities of various competitors of plaintiff, engaged in mail order business without maintaining any place of business in Iowa. There was also testimony regarding the difficulty of collecting a use tax on mail order sales made to persons in Iowa through the mail order establishments of plaintiff located outside of Iowa. We do not undertake to review this testimony because we do not think it has any substantial bearing upon the questions to be decided by us.

The court held that the use tax law, insofar as it purports to authorize the defendants to insist upon plaintiff collecting and paying the use tax on mail order sales made to persons in Iowa through the mail order establishments located outside of Iowa, is unconstitutional and void, being contrary to Section 8 of Article I of the Constitution of the United States, and Section 1 of the 14th Amendment thereto. A permanent injunction was granted restraining defendants from making any finding that plaintiff has failed to comply with the provisions of the Iowa

use tax law or taking any action to secure the revocation or cancellation of its sales permit covering the operation of its retail stores in Iowa or its license to do business as a foreign corporation in this state. From this decree defendants have appealed.

The statute involved herein was enacted as Chapter 198 of the Acts of the 47th General Assembly. Some amendments were adopted by Chapters 175 and 182 of the Acts of the 48th General Assembly. The statute, as amended, appears as Chapter 329.4 of the Code, 1939. The amendments do not appear to materially affect the questions presented by this litigation, and we will refer to the statute as it appears in the Code, 1939.

Section 8 of the Act (Section 643.109 of the Code, 1939) provides that every retailer maintaining a place of busi- [fol. 135] ness in this state and making sales of tangible property for use in this state, not exempt under Section 6943.104, exempting sales on which the sales tax is paid or by Section 6943.107, having reference to motor vehicles, "shall at the time of making such sales, whether within or without the state, collect the tax imposed by this chapter from the purchaser." Section 11 of the Act (Section 6943.112 of the Code) provides that the tax, required to be collected by the retailer and any tax collected by the retailer pursuant to said Section, shall constitute a debt owed by the retailer to the state. Section 21 of the Act (Section 6943.122 of the Code) provides that, whenever the retailer maintaining a place of business in this state is a corporation authorized to do business in this state and fails to comply with the provisions of the chapter, a certificate may be made to the secretary of state of a finding that such retailer has failed to comply with such provisions, and the secretary of state shall, upon receipt of such certificate, revoke the permit authorizing the corporation to do business in this state, and shall issue a new permit only when the corporation shall have obtained an order finding that it has complied with its obligations under the chapter.

The question presented is whether Section 6943.109, requiring plaintiff to collect the tax on mail order sales made without the state, is constitutional when considered with the provision that, under Section 6943.112, the tax, collected or required to be collected, is a debt of plaintiff, and, upon a finding that plaintiff has failed to pay such

debt, under Section 6943.122, plaintiff's permit to do business as a foreign corporation in this state must be revoked. We are of the opinion that the court correctly held that the provisions of the chapter, as applied to the mail order sales shown by the record herein, are unconstitutional and, therefore, void.

[fol. 136] If the plaintiff limited its activities to conducting a mail order business such as shown by the record herein, it would not be doing business in this state and the state could not require it to secure a license to do business here. Ryerson & Son v. Schraag, 211 Iowa 558, 561 to 563, 229 N. W. 733; Anderson Bros. v. Sioux Monument Co., 210 Iowa 1226, 1231, 232 N. W. 689. With plaintiff's activities so limited, it would not be conducting a retail business in Iowa, and, therefore, would not be subject to the requirements of Section 6943.109. Defendants contend, however, that when plaintiff undertakes to do a retail business here, under a permit issued by the secretary of state, the state has the right to attach, as a condition to plaintiff's right to do business here, a requirement that it collect the use tax on sales made outside of Iowa, as to which sales plaintiff otherwise would have no obligation to this state. The court found otherwise, and correctly so.

Defendants contend that the tax is a tax upon the use of property in this state, is really a tax upon the purchaser and is not a tax upon the plaintiff at all. Perhaps from a subtle and technical standpoint this may be true, but, if true, it is unimportant. Section 6943.109 requires that the tax be collected when the sale is made. Under the facts herein, the property is then without the state. Section 6943.112 makes the amount of the tax a debt owed by plaintiff and Section 6943.122 provides that a failure to pay that debt shall constitute proper grounds for revoking plaintiff's permit to do business in this state. From any reasonable or practical standpoint, the amount of the tax being made a debt of plaintiff, the statute at least constitutes regulation of plaintiff's activities outside the state as a condition to it being granted a license to do business in the state. This cannot be done.

[fol. 137] In the case of Conn. Gen. Life Ins. Co. v. Johnson, 303 U. S. 77, 80; 58 S. Ct. 436, 82 L. ed. 673, the court, through Justice Stone, states:

"But the limits of the state's legislative jurisdiction to tax, prescribed by the Fourteenth Amendment, are to be ascertained by reference to the incidence of the tax upon its objects rather than the ultimate thrust of the economic benefits and burdens of transactions within the state. As a matter of convenience and certainty, and to secure a practically just operation of the constitutional prohibition, we look to the state power to control the objects of the tax as marking the boundaries of the power to lay it. Hence it is that a state which controls the property and activities within its boundaries of a foreign corporation admitted to do business there may tax them. But the due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere. Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. ed. 150, 26 S. Ct. 36, 4 Ann. Cas. 493; New York L. Ins. Co. v. Head, 234 U. S. 149, 58 L. ed. 1259, 34 S. Ct. 879; New York L. Ins. Co. v. Dodge, 246 U. S. 357, 62 L. ed. 772, 38 S. Ct. 337, Ann. Cas. 1918E, 593; St. Louis Cotton Compress Co. v. Arkansas, 260 U. S. 346, 67 L. ed. 297, 43 S. Ct. 125; Compania General de Tabacos v. Collector of Internal Revenue, 275 U. S. 67, 72 L. ed. 177, 48 S. Ct. 100; Home Ins. Co. v. Dick, 281 U. S. 397, 74 L. ed. 926, 50 S. Ct. 338, 74 A. L. R. 701; Hartford Acci. & Indem. Co. v. Delta. & P. Land Co., 292 U. S. 143, 78 L. ed. 1178, 54 S. Ct. 634, 92 A. L. R. 928; Boseman v. Connecticut General L. Ins. Co., 301 U. S. 196, 81 L. ed. 1036, 57 S. Ct. 686, 110 A. L. R. 732; People ex rel. Sea Ins. Co. v. Graves, 274 N. Y. 312, 8 N. E. (2d) 872."

In the case of Union Refr. Transit Co. v. Kentucky, 199 U. S. 194, 204, 50 L. ed. 150, 26 S. Ct. 36, 4 Ann. Cas. 493, the court states:

"It is also essential to the validity of a tax that the property shall be within the territorial jurisdiction of the [fol. 138] taxing power. Not only is the operation of state laws limited to persons and property within the boundaries of the state, but property which is wholly and exclusively within the jurisdiction of another state receives none of the protection for which the tax is supposed to be the compensation."

In the case of New York Life Ins. Co. v. Dodge, 246 U. S. 357, 375, 62 L. ed. 772, 38 S. Ct. 337, Ann. Cas. 1918E, 583, the court states:

"Assuming the policy to be a Missouri Contract, we declared that state without power to extend its authority over citizens of New Mexico and into New York and forbid the later agreement there made simply because it modified the first one. We said: 'It would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that state and in the state of New York, and there destroy freedom of contract without throwing down the constitutional barriers by which all the states are restricted within the orbits of their lawful authority and upon the preservation of which the government, under the Constitution, depends.' "

In the case of New York Life Ins. Co. v. Head, 234 U. S. 149, 164, 58 L. ed. 1259, 34 S. Ct. 879, the court, through Chief Justice White, states:

"It is true it has been held that, in view of the power of a state over insurance, it might, as a condition of a license given to a foreign insurance company to do business within its borders, impose a condition as to business within the state, which otherwise, but for the complete power to exclude, would be held repugnant to the Constitution. In other words, that a company having otherwise no right whatever, for any purpose, to go in without a license, would not be heard, after accepting the same, to complain of exactions upon which the license was conditioned as unconstitutional, because of its voluntary submission to the same. But even if it be put out of view [fol. 139] that this doctrine has been either expressly or by necessary implication overruled, or, at all events, so restricted as to deprive it of all application to this case (see Harrison v. St. Louis & S. F. R. Co., 232 U. S. 318, 332, 58 L. ed. 621, 625, 34 Sup. Ct. Rep. 333, and authorities there cited), it here can have no possible application since such doctrine, at best, but recognized the power of a state, under the circumstances stated, to impose conditions upon the right to do the business embraced by the license, and therefore gives no support to the contention here presented, which is that a state, by a license, may acquire the right to exert an authority beyond its

borders which it cannot exercise consistently with the Constitution. But the Constitution and its limitations are the safeguards of all the states, preventing any and all of them, under the guise of license or otherwise, from exercising powers not possessed."

In the case of Home Ins. Co. v. Dick, 281 U. S. 397, 407; 74 L. ed. 926, 50 S. Ct. 338, 74 A. L. R. 701, the court, through Justice Brandeis, states:

"Second. The Texas statute as here construed and applied deprives the garnishees of property without due process of law. A state may, of course, prohibit and declare invalid the making of certain contracts within its borders. Ordinarily, it may prohibit performance within its borders, even of contracts validly made elsewhere, if they are required to be performed within the state and their performance would violate its laws. But, in the case at bar, nothing in any way relating to the policy sued on, or to the contracts of reinsurance, was ever done or required to be done in Texas. All acts relating to the making of the policy were done in Mexico. All in relation to the making of the contracts of reinsurance were done there or in New York. And, likewise, all things in regard to performance were to be done outside of Texas. Neither the Texas laws nor the Texas courts were invoked for any purpose, except by Dick in the bringing of this suit. The fact that Dick's permanent residence was in Texas [fol. 140] is without significance. At all times here material, he was physically present and acting in Mexico. Texas was, therefore, without power to affect the terms of contracts so made. Its attempt to impose a greater obligation than that agreed upon and to seize property in payment of the imposed obligation violates the guaranty against deprivation of property without due process of law. Compania General de Tabacos de Filipinas v. Collector of Internal Revenue, 275 U. S. 87, 72 L. ed. 177, 48 Sup. Ct. Rep. 100; Aetna L. Ins. Co. v. Dunken, 266 U. S. 328, 69 L. ed. 342, 45 Sup. Ct. Rep. 129; New York L. Ins. Co. v. Dodge, 246 U. S. 357, 62 L. ed. 772, 38 Sup. Ct. Rep. 337, Ann. Cas. 1918E, 593."

In the case of Hartford Acci. & Ind. Co. v. Delta & P. Land Co., 292 U. S. 143, 78 L. ed. 1178, 54 S. Ct. 634, 92 A. L. R. 928, the court, through Justice Roberts, states:

"The Mississippi statutes, so construed, deprive the appellant of due process of law. A state may limit or prohibit the making of certain contracts within its own territory (Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 15 S. Ct. 207, 5 Inters. Com. Rep. 610; Orient Ins. Co. v. Daggs, 172 U. S. 557, 565, 566, 43 L. ed. 552, 555, 556, 19 S. Ct. 281; New York L. Ins. Co. v. Cravens, 178 U. S. 389, 398, 399, 44 L. ed. 1116, 1123, 1124, 20 S. Ct. 962); but it cannot extend the effect of its laws beyond its borders so as to destroy or impair the right of citizens of other states to make a contract not operative within its jurisdiction, and lawful where made. New York L. Ins. Co. v. Head, 234 U. S. 149, 58 L. ed. 1259, 34 S. Ct. 879; Aetna L. Ins. Co. v. Dunken, 266 U. S. 389, 399, 69 L. ed. 342, 349, 45 S. Ct. 129. Nor may it in an action based upon such a contract enlarge the obligations of the parties to accord with every local statutory policy solely upon the ground that one of the parties is its own citizen. Home Ins. Co. v. Dick, 281 U. S. 397, 407, 408, 74 L. ed. 926, 933, 934, 50 S. Ct. 338, 74 A. L. R. 701."

[fol. 141] In the case of St. Louis Cotton Compress Co. v. Arkansas, 260 U. S. 346, 349, 43 S. Ct. 125, 67 L. ed. 297, the court, through Justice Holmes, states:

"It is true that the state may regulate the activities of foreign corporations within the state, but it cannot regulate or interfere with what they do outside."

In the case of James v. Dravo Contracting Co., 302 U. S. 134, 139, 58 S. Ct. 208, 82 L. ed. 155, the court, through Chief Justice Hughes, states:

"It is clear that West Virginia had no jurisdiction to lay a tax upon respondent with respect to this work done in Pennsylvania. As to the material and equipment there fabricated, the business and activities of respondent in West Virginia consisted of the installation at the respective sites within that state and an apportionment would in any event be necessary to limit the tax accordingly, Hans Rees' Sons v. North Carolina, 283 U. S. 123, 75 L. ed. 870, 51 S. Ct. 385, supra."

In the case of Baldwin v. Seelig, 294 U. S. 511, 521, 55 S. Ct. 497, 79 L. ed. 1032, the court, through Justice Cardozo, states:

"New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there. So much is not disputed. New York is equally without power to prohibit the introduction within her territory of milk of wholesome quality acquired in Vermont, whether at high prices or at low ones. This again is not disputed. Accepting those postulates, New York asserts her power to outlaw milk so introduced by prohibiting its sale thereafter if the price that has been paid for it to the farmers of Vermont is less than would be owing in like circumstances to farmers in New York. The importer in that view may keep his milk or drink it, but sell it he may not.

[fol. 142] "Such a power, if exerted, will set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported. * * *

"If New York in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation."

Other cases might be cited and quoted from. To do so would unduly prolong this opinion. The foregoing, in our judgment, demonstrate that the position taken by the Supreme Court of the United States in construing the constitution is such that the decree herein must be affirmed. The State of Iowa has the right to control and tax the property and activities of the plaintiff within its boundaries. It may also control and tax such property and activities as a condition to permitting plaintiff to do business as a foreign corporation here. But it has no power to regulate plaintiff's activities outside this state, nor has it the power to regulate such activities as a condition to plaintiff's right to continue to do business here.

The only activities of plaintiff involved herein are the sales made pursuant to its mail order business. As to all other activities, for the purposes of this case, plaintiff concedes that the tax must be paid and it has been collected and paid. The mail order sales, however, do not constitute activities within the State of Iowa, nor do such sales constitute doing business within the state. The sales are con-

summated outside the State of Iowa in each instance. They are separate and distinct from plaintiff's activities in Iowa. The statute here challenged seeks to impose upon plaintiff the obligation that it "shall at the time of making such sales, whether within or without the state, collect the tax [fol. 143] imposed by this chapter from the purchaser." The sales are made outside of Iowa and the statute requires plaintiff to collect the tax at the time the sales are made. It clearly seeks to regulate activities of plaintiff outside the state. Under the provisions of Section 6943.122, defendants seek to cancel plaintiff's license as a retailer in this state and its permit to do business here as a foreign corporation for failure to pay a debt which constitutes a regulation of its activities outside of Iowa. Under repeated pronouncements of the Supreme Court of the United States, hereinbefore reviewed and quoted from, the State of Iowa has no such right. The court correctly so held.

Defendants contend, however, that recent decisions of the Supreme Court of the United States demonstrate that the precedents herein reviewed and followed have been overruled and are no longer to be considered interpretations of the Constitution of the United States. We are unable to agree with such contentions.

The case of Monamotor Oil Co. v. Johnson, 292 U. S. 86, 78 L. ed. 1141, 54 S. Ct. 575, involved the collection of a use tax in Iowa. However, the fact situation was very different from that presented by the record herein. At page 90 of 292 U. S., Justice Roberts states the facts as follows:

"The appellant is an Arizona corporation whose business is the buying, manufacturing, blending and selling of gasoline and kindred products, including the importation into Iowa of gasoline by tank cars, trucks and other containers, for resale to consumers and to dealers who sell to consumers, and the exportation of gasoline to other states; the maintenance of storage facilities in Iowa, from which deliveries are made in that and other states, and the maintenance of a refinery at Carter Lake, Iowa, where gasoline is blended and compounded and shipped to points in Iowa and [fol. 144] other states. Prior to April, 1932, gasoline was refined at this plant. The corporation maintains numerous service stations in Iowa which sell to consumers."

It will be noted from the above statement of facts that the use tax which the appellant was required to collect pertained

to gasoline and kindred products sold and delivered by it in connection with its activities within the State of Iowa. The question presented for our consideration was not involved in that decision.

The case of Wiloil Corp. v. Pennsylvania, 294 U. S. 169, 79 L. ed. 838, 55 S. Ct. 358, was similar to the Monamotor Oil Co. case. The facts involved in that case are stated by Justice Butler, at page 172 of 294 U. S., as follows:

"Appellant, a Pennsylvania corporation having its principal place of business in Pittsburgh, sells liquid fuels at wholesale and is a distributor as defined by the act. The tax in controversy was laid at three cents per gallon upon the contents of 13 tank cars sold and delivered by it. All were ordered through its agent in Philadelphia for delivery to purchasers at that city or at Essington, Pennsylvania. The orders specified a price per gallon 'f. o. b. Wilmington, Del., plus 3c tax,' and were subject to, and received, appellant's approval at its office in Pittsburgh."

From the foregoing quotation, it will be noted that the tax involved in that case pertained to activities of appellant within the state of Pennsylvania.

The case of Great Atlantic & Pacific Tea Co. v. Grosjean, 301 U. S. 412, 81 L. ed. 1193, 57 S. Ct. 772, involved a tax upon chain stores located in and operated by the Great Atlantic & Pacific Tea Company in the State of Louisiana. The property was located in and the activities were conducted in the taxing state.

[fol. 145] The case of Felt & Tarrant Mfg. Co. v. Gallagher, 306 U. S. 62, 83 L. ed. 488, 59 S. Ct. 376, involved the collection of a use tax on property sold by the appellant through its general agents, who were doing business in the State of California. In setting forth the facts, Justice McReynolds quotes from the statement made by the lower court in 23 Fed. Supp. 186, as follows:

"That each of these two general agents maintains an office in this state, the lease to such office designating the plaintiff as lessee therein, the rent for the same being paid by plaintiff, while all other expenses of maintaining such office are paid by the general agent. As soon as an order is accepted a particular machine is appropriated for that purpose in plaintiff's shipping department in Illinois. All machines sold for delivery in California are shipped from

one of plaintiff's distributing points outside of the state. Sometimes machines are forwarded directly to the purchasers, while in other instances, in order to secure reduced freight charges, large groups of machines are shipped to the general agent who makes delivery to the respective purchasers."

It will be noted from the above quotation that the sales involved were solicited by agents in California, and in many instances the deliveries were made by the same agent in California. The tax, therefore, pertained to activities of the appellant through its general agents and their subagents, who were undertaking to do business for appellant in the State of California.

The case of Henneford v. Silas Mason Co., 300 U. S. 577, 81 L. ed. 814, 57 S. Ct. 524, did not involve the vendor of personal property at all. It sustained a tax levied by the State of Washington against the owner of machinery and other property brought into the State of Washington and then being used in connection with the construction of the [fol. 146] Grand Coulee dam. The question there presented was entirely different than that which now confronts us.

The recent case of McGoldrick v. Berwind-White Coal Mining Co., decided January 29, 1940, sustains a tax levied by the City of New York on sales made in the City of New York. The products were sold and delivered in that city. The tax pertained to activities within the jurisdiction of the taxing body.

By reason of the foregoing, we are satisfied that the recent decisions of the Supreme Court of the United States, cited to us by defendants, do not involve the question that confronts us and the decisions do not overrule the precedents which we consider controlling here.

Our position is somewhat fortified by the recent case of McCarroll v. Dixie Greyhound Lines, decided February 12, 1940. The opinion was delivered by Justice McReynolds. Chief Justice Hughes, Justice Roberts, Justice Reed and Justice Stone concurred specially in an opinion prepared by Justice Stone. The court held that an Arkansas statute which prohibited entry into the state of any automobile or truck carrying over 20 gallons of gasoline until the state tax thereon of 6½ cents per gallon had been paid, was unconstitutional as applied to certain busses operated by the appellee in the states of Tennessee, Arkansas and Missouri. The opinion of Justice McReynolds states as follows:

"The often announced rule is that while generally a state may not directly burden interstate commerce by taxation she may require all who use her roads to make resonable compensation therefor. Hendrick v. Maryland, 235 U. S. 610, 622; Interstate Transit, Inc., v. Lindsey, supra, 185, 186; Bingaman v. Golden Eagle Western Lines, 297 U. S. 626, 628.

"Here, the revenue officer demanded payment of appellee on account of gasoline to be immediately transported over [fol. 147] the roads of Arkansas for consumption beyond. If, considering all the circumstances, this imposition reasonably can be regarded as proper compensation for using the roads it is permissible. But the facts disclosed are incompatible with that view."

The concurring opinion of Justice Stone states as follows:

"Since the subject taxed, gasoline introduced into the state in the tank of a vehicle, for use solely in propelling it in interstate commerce, is immune from state taxation except for a limited state purpose, the exaction of a reasonable charge for the use of its highways, it is not enough that the tax when collected is expended upon the state's highways. It must appear on the face of the statute or be demonstrable that the tax as laid is measured by or has some fair relationship to the use of the highways for which the charge is made. Sprout v. City of South Bend, 277 U. S. 163, 170; Interstate Transit, Inc., v. Lindsey, 283 U. S. 183, 186; Bingaman v. Golden Eagle Western Lines, 297 U. S. 626, 628; Morf v. Bingaman, 298 U. S. 407; Ingels v. Morf, 300 U. S. 290, 294."

Justice Stone concludes as follows:

"There are ways enough in which the state can take its lawful toll without any suppression of the commerce which it taxes. In laying an exaction as a means of collecting compensation for the use of its highways the state must tax the commerce as it is done, and not as it might be done if the state could control it. Appellant cannot justify an unlawful exaction by insisting that it would be lawful if the taxpayer were to relinquish some of the commerce which the Constitution protects from state interference."

While the question presented in the case last quoted from is different than the question that now confronts us, it seems apparent that the decision there made was prompted by

[fol. 148] some of the principles of law which are recognized and applied in the precedents which we deem controlling here. Accordingly, the decision strengthens our conviction that such precedents have not been overruled and are still binding upon us. The decree appealed from is in accord with such precedents. It must be and it is—Affirmed.

Sager, Hale, Bliss and Oliver, J. J., concur.

Hamilton, C. J., and Mitchell, Richards and Stiger, J. J., dissent.

DISSENTING OPINION

MITCHELL, J., dissenting:

I find myself unable to agree with the majority and respectfuly dissent.

This is not a case in which there is a tax on interstate commerce, nor is there any unreasonable burden placed upon the Sears Roebuck Company. The sole question is whether the State of Iowa can say to this corporation, that before Iowa will permit the corporation to do business in Iowa, it must collect and report the Use Tax, which is a tax on the purchaser.

In the recent case of Ford Motor Company v. Beauchamp, 60 S. Ct. 273, the Supreme Court of the United States speaking through Mr. Justice Reed said:

"The statute calls the excise a franchise tax. It is obviously payment for the privilege of carrying on business in Texas. There is no question but the State has the power to make a charge against domestic or foreign corporations for the opportunity to transact this intrastate business. The exploitation by foreign corporations of intrastate opportunities under the protection and encouragement of local government offers a basis for taxation as unrestricted as that for domestic corporations. In laying a local privilege tax, the state sovereignty may place a charge upon that [fol. 149] privilege for the protection afforded. When that charge, as here, is based upon the proportion of the capital employed in Texas, calculated by the percentage of sales which are within the state, no provision of the Federal Constitution is violated."

In the case at bar, it is not a tax or an unreasonable burden, and if the corporation desires the privilege of doing business in Iowa, they must comply with the requirement

of the law as far as the Use Tax is concerned or the State of Iowa can properly refuse to grant the corporation the permit to do business in Iowa.

I would reverse the case.

DISSENTING OPINION

HAMILTON, C. J., dissenting:

Being unable to concur in the majority opinion, I respectfully dissent.

The Iowa Use Tax Act, imposing a two per cent tax upon the use of tangible personal property, was enacted by the General Assembly of Iowa (Chapter 198, 47th G. A.) at its 47th Session held in 1937, and is complementary to the Retail Sales Tax Act, imposing a two per cent tax upon the gross receipts from sales at retail, (Chapter 196, 47th G. A.) passed at the same session of the Legislature. The Use Tax Act provides for exemption from the tax when the property has already been subjected to a tax on sales or use by any other state equal to or greater than the use tax imposed by the Iowa law. By Section 8 of the Act:

"Every retailer maintaining a place of business in this state and making sales of tangible personal property for use in this state, (not exempt) * * * shall at the time of making such sales, whether within or without the state, collect the tax imposed by this act from the purchaser, * * *"

[fol. 150] By Section 11, the tax required to be collected and any tax collected by any retailer "shall constitute a debt owed by the retailer to this state." Other provisions of the Use Tax Act provide for making returns and remittance of the tax imposing penalties, etc., none of which are material in the consideration of the questions here involved.

The theory of the majority opinion, as I understand it, is based on this formula: The property, which the mail order house, appellee, is selling to Iowa users, is situated outside of the State of Iowa; the sale is consummated outside of the State of Iowa; hence, to require the seller to collect the tax at the time of the sale is an attempt to regulate an out-of-state activity which is forbidden by the 14th Amendment to the United States Constitution.

This is exactly the set up which existed in the case of Felt & Tarrant Mfg. Co. v. Gallagher, 306 U. S. 62, 83

L. ed. 488, 59 S. Ct. 376, in which case the court upheld the California law, the collection feature of which is identical with that of the Iowa Use Tax Act. Appellee attempts to differentiate between the Felt & Tarrant Mfg. Co. case and the instant case and further contends that the issue of extraterritoriality involved in the instant case was not raised, argued or decided in the California case. We disagree with counsel for appellee. Mr. Justice McReynolds, who has never been accused of being unable to clearly express himself, states the issues as follows:

"Appellant seeks an injunction prohibiting the state officers from enforcing against it the California Use Tax Act of 1935. (Cal. Stat. 1935, Chap. 361, as amended by Cal. Stat. 1937, Chaps. 401, 671 and 683.) Counsel do not question the right of the state to collect this tax from the user, etc., but they say that, in the circumstances here disclosed, the officers may not compel appellant *to serve as an agent for collecting the tax* as they are threatening to do." (Italics ours.)

[fol. 151] This is exactly the contention which appellee, in the instant case, is now making. From a reading of the opinion, it will be noticed that appellant was an Illinois corporation, engaged in manufacturing comptometers in that state and delivering these to purchasers in various states of the Union. Its method of doing business is set forth in the opinion. Mr. Justice McReynolds states, in the following paragraph taken from the opinion, what the argument was:

"The argument is this—

"The appellant, an Illinois corporation, carried on no intrastate operations in California and is not subject to its jurisdiction. Such business as it transacts in California is interstate in character. California, therefore, lacks the power to require it (1) to act as the state's collecting agent with respect to use tax which may become due from California storers, users or consumers, or (2) to insure payment of such tax if it fails to make collections from the tax debtors, or (3) otherwise to act as a 'retailer' as defined by the Act and the appellees. The treatment of the appellant as a retailer subject to the provisions of the California Use Tax Act is a direct burden upon interstate commerce prohibited by the Federal Constitution.

Numerous provisions of the statute, if applied, would deprive appellant of its property without due process of law."

The foregoing, in substance, is the argument now made to this court in the instant case. In deciding the California case, the United States Supreme Court simply said:

"The trial court thought that both contentions were foreclosed by what was said and ruled in Bowman v. Continental Oil Co., 256 U. S. 642, 650, 65 L. ed. 1139, 1145, 41 S. Ct. 606; Monamotor Oil Co. v. Johnson, 292 U. S. 86, 93, 95, 78 L. ed. 1141, 1147, 1148, 54 S. Ct. 575; and Henneford v. Silas Mason Co., 300 U. S. 577, 582, 583, 81 L. ed. 814, 818, 819, 57 S. Ct. 524. And we agree with that conclusion."

[fol. 152] It will be noticed that, in the California case, the out-of-state corporation was not even qualified to do intrastate business in California. It was not licensed as a retailer but the Federal Court held that, in maintaining two offices in the state, it came within the definition of "retailer" as defined by the California Use Tax Act. The orders taken were required to be submitted to and approved by the plaintiff corporation in Illinois. All sales and deliveries were required to be made by the plaintiff corporation. The general agents, domiciled in California, were prohibited from making collections, and all payments for goods ordered were required to be made directly to the plaintiff. Some of the goods were shipped direct to purchasers in California; others were shipped to the general agents, to save freight, who, in turn, delivered them to the purchasers. In so far as the activity of collecting the tax is concerned, it would necessarily have to be as completely an out-of-state activity as in the instant case. There was no sale in California; the agents were merely solicitors of orders; the orders were sent by mail to be accepted by the company in Illinois; purchase price was to be paid in Illinois and the goods shipped directly from Illinois to the purchaser. Only the machine used in demonstration was in California. We can see no material distinction in principle between the Felt & Tarrant Mfg. Co. case and the instant case.

We do think the facts in the instant case in support of the regulatory means of collecting the tax are stronger than those in the California case. In the instant case, Iowa has granted the appellee two privileges: (1) the privilege of

doing business as a foreign corporation, and (2) the privilege of operating a retail merchandising business within the state. These privileges granted furnish a more substantial basis for upholding and sustaining the burden im- [fol. 153] posed than anything appearing in the California case.

Appellee points out the activities of the two general agents soliciting orders in California and of the delivery of some of the machines by the agents to the purchasers as distinguishing features from the mail order sales involved in the instant case. Counsel is overlooking the fact that the regulatory provision for collecting the tax at the time of making the sale in Illinois is just as much an out-of-state activity. The purchase price was paid not to the agent but to the Illinois corporation which, under the California law, was required to collect the tax. Counsel is also wrong in saying there is no intrastate activity on the part of appellee in connection with the mail order business. The intrastate activities, in connection with mail order sales, consist first in the activity of the retailer, appellee, soliciting business from Iowa residents by means of distribution of large and small catalogues and special sales bulletins; by this means appellee displays its merchandise, its prices and gives its sales talk to the Iowa customers; by this means it made, in 1937, 1,200,000 sales to Iowa residents. The activity of the purchaser within the State of Iowa consisted of making out the order, enclosing the purchase price, the carrying charges (and the requisite tax, if the law was obeyed), and placing the order in the mail and, after receipt of the goods, making use of same. The fact that the appellee, in distributing its catalogues, makes use of the express company or the United States mail instead of using its own motor trucks and making a house-to-house personal delivery of the catalogues does not make its conduct in this respect any less an activity within the state. Other activities within the State of Iowa, which obviously may be necessary, are—making adjustments in case of damaged, soiled, misfit or [fol. 154] defective merchandise, or in the exchange of the merchandise, for any reason, which might require, in the adjustment, return of a portion of the purchase price paid; as to its credit or installment business, it might even require court action to repossess the property.

Activities, similar to the above, which are obvious were taken into consideration by the court in Equitable L. Assur. Soc. v. Pennsylvania, 238 U. S. 147, 59 L. ed. 1239, 35 S. Ct. 829, wherein Justice Holmes, in expresing the views of the court, said:

"It is obvious that many incidents of the contract are likely to be attended to in Pensylvania, such as payment of dividends when received in cash, sending an adjuster into the state in case of dispute, or making proof of death."

Similar obvious activities were given consideration by Chief Justice Taft in the second division of the opinion in Compania General de Tobacos v. Collecter of Internal Revenue, 275 U. S. 98, 72 L. ed. 182, 48 S. Ct. 100. Justice Stone, in the opinion in the case of Connecticut Gen. L. Ins. Co. v. Johnson, 303 U. S. 77, 82 L. ed. 673, 58 S. Ct. 436,—which case is strongly relied upon in the majority opinion in the instant case,—calls attention to the last two cited cases distinguishing them from the Johnson case. In the Johnson case, the reinsurance contracts involved were entirely out-of-state transactions. By its terms it called for no act in California. No act in the course of their formation, performance, or discharge took place there. The contracts were made in Connecticut; the premiums were payable there; the adjustment and payment of losses took place in Connecticut and the court said:

"* * * there is no basis for saying that reinsurance which does not run to the original insured, and which from [fol. 155] its inception to its termination involves no action taken within California, even the settlement and adjustment of claims, is embraced in any privilege granted by that state."

We have no quarrel with the Johnson case. In discussing the 14th Amendment, Justice Stone, in the Johnson case, states:

"As a matter of convenience and certainty, and to secure a practically just operation of the constitutional prohibition, we look to the state power to control the objects of the tax as marking the boundaries of the power to lay it."

When we examine the Iowa Use Tax Act, we find the "objects" to be tangible personal property. The incident

of the tax is the use of this property within the State of Iowa by the purchaser whether purchased within or without the state. Obviously, both the objects of the tax and the incident of the tax are within the boundaries of the State of Iowa. The Use Tax being a tax against the purchaser-user within this state, the power to lay the tax is within the orbit of state power. This the appellee is forced to concede, under all the holdings of the United States Supreme Court. But they say, even so, yet, when it comes to the matter of collecting the tax from Iowa persons using the property purchased from appellee through the mail order system, that Iowa may not require the Illinois corporation, as a condition to its right or privilege of continuing to conduct its business in this state, to assist the state authorities in the collection of the tax and that to require it to do so is an invasion of the due process clause of the Federal Constitution. The same contention was made in the case of Monamotor Oil Co. v. Johnson, supra, and in disposing of this feature, Justice Roberts, speaking for the court, said:

[fol. 156] "Instead of collecting the tax from the user through its own officers, the state makes the distributor its agent for that purpose. This is a common and entirely lawful arrangement. * * * and the requirement that the appellant as the shipper into Iowa shall, as agent of the state, report and pay the tax on the gasoline thus coming into the state for use by others on whom the tax falls imposes no unconstitutional burden either upon interstate commerce or upon the appellant.

"The method of imposition and collection of the tax does not deny the equal protection of the laws guaranteed by the Fourteenth Amendment." (Italics ours.)

In the case of Henneford v. Silas Mason Co., supra, the United States Supreme Court had under consideration the Use Tax Act of the State of Washington, which is very similar to the Iowa Use Tax Act. The extraterritorial feature presented in the instant case was not involved in the Henneford case; however, the opinion written by the late eminent Mr. Justice Cardozo does contain a very masterful, general analysis of the Use Tax Law and to our mind is a complete answer to every contention relied upon by appellee other than the so-called extraterritorial issue. See also the recent case: Osborn v. Ozlin, U. S.

Supreme Court filed April 27, 1940, opinion by Mr. Justice Frankfurter.

The Iowa Use Tax is not laid upon property outside state boundaries nor upon the sale of property made outside the state nor can it be said that the tax is upon any privilege exercised and enjoyed by appellee in other states. Contra, the tax is laid on the privilege of use within the state, and the incidental burden of collecting the tax is upon the privilege granted by the state to appellee,—a privilege actually made use of—, to engage in the retail business within the state. The place of making the sale [fol. 157] has no connection with the duty of collecting the tax. The same duty applied to all retailers within the state no matter where the sale is made. The state in effect constitutes the retailer its agent for the purpose of collecting from the source, to-wit, the purchaser, the tax which admittedly the purchaser-user owes the state. The state says to each retailer:

"In consideration of the right or privilege of engaging in the retail business in Iowa, you must aid the state in its administration of the law by performing this incidental duty of collecting the tax at the time of making the sale."

The difficulty of enforcing the tax provisions, in any other manner, would seem to be insurmountable; hence, the duty imposed of aiding the state in administering the law follows natural and reasonable avenues. The suggested difficulty, loss and expense, which appellee will sustain in connection with the collection of the tax from mail order customers due to the fact that some would not include the tax with the purchase price, is answered by Mr. Justice Brandeis, in the opinion of Pierce Oil Co. v. Hopkins, 264 U. S. 137, 68 L. ed. 592, 596, in the following language:

"A short answer to this argument is that the seller is directed to collect the tax from the purchaser when he makes the sale; and that a state which has, under its constitution, power to regulate the business of selling gasoline (and doubtless, also, the power to tax the privilege of carrying on that business), is not prevented by the due process clause from imposing the incidental burden."

Appellee's contention, that the law discriminates against it in that other out-of-state mail order houses, who have

not qualified as retailers within the State of Iowa, are not subject to the burden of collecting the tax, may be disposed [fol. 158] of by stating that such corporations enjoy no privilege granted to them by the State of Iowa. The mail order business conducted by appellee is only one branch of its extensive business transacted with Iowa customers. It enjoys the privilege of operating twelve large retail stores within the state; all of these stores carry on a mail order business for their customers if the goods wanted are not carried in stock; and, through the means of distributing hundreds of thousands of catalogues to people throughout the State of Iowa, they reach into the state and transact business, designated as Type III, amounting to more than five and a half million dollars annually, comprising approximately 1,200,000 orders with Iowa mail order customers, in the year 1937. Needless to say, the privilege of doing business in Iowa is a valuable one, and the incidental burden of collecting the tax is no greater upon appellee than upon other domestic concerns doing business in competition with appellee within the state. It is a fact, so well known as to be judicially noticed, that practically all department stores in the state do a large mail order business in connection with their regular business, and, as to such business, would experience the same difficulty in collecting the tax in full from mail order customers. The incident of the tax being upon the use of the property within this state cannot be said to be an attempt on the part of the State to regulate out-of-state activities. No other state could impose a like burden upon the use of property within the State of Iowa, and, should the sister states, in which appellee's mail order establishments are situated, impose a sales tax or use tax equal or greater than the use tax imposed by the Iowa law, and the user in Iowa has paid the same, the Iowa Use Tax would not attach; hence, there is no possibility of a double imposition of the same burden.

[fol. 159] The Use Tax Act being complementary to the Retail Sales Tax, the two acts should be construed together. In this state, statutes in pari materia are construed together. Conly v. Dilley, 153 Iowa 677, 133 N. W. 730; Story County v. Hansen, 178 Iowa 452, 159 N. W. 1000; Balen v. Colfax Cons. Coal Co., 183 Iowa 1198, 168 N. W. 246; Fitzgerald v. State, 220 Iowa 547, 260 N. W. 681. The propriety of this rule was recognized by the United States Supreme

Court in Gregg Dyeing Co. v. Query, 286 U. S. 472, 76 L. ed. 1232, 52 S. Ct. 631, 84 A. L. R. 831, wherein Chief Justice Hughes, speaking for the court, said:

"There is no demand in that Constitution that the State shall put its requirements in any one statute. It may distribute them as it sees fit, if the result, taken in its totality, is within the State's constitutional power."

When the two acts are considered together, it is manifest that the general plan and purpose running throughout the provisions of the statutes is that of equal distribution, as far as possible, of the burden as between domestic and foreign corporations conducting a retail business within the state, and that there is nothing in the law imposing the tax or the regulatory means adopted for collecting the same which imposes an inequality upon or discriminates against appellee.

We hold that the collection provisions of the Iowa Use Tax Act, as applied by the appellants, is not an invasion of the constitutional provisions of the Constitution of the United States relied upon by appellee and, accordingly, the decree of the trial court should be reversed.

Stiger and Richards, J. J., join in dissent.

[fol. 160] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 161] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1940

The petition herein for a writ of certiorari to the Supreme Court of the State of Iowa is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Stone and Mr. Justice Roberts took no part in the consideration and decision of this application.